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No. .....

In The

Supreme Court of the United States

October Term, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION AND THE SIERRA PACIFIC POWER COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals failed to give appropriate deference to the Federal Energy Regulatory Commission (FERC) in the interpretation of FERC's own authorizing statute, the Federal Power Act, 16 U. S. C. § 791a et seq.

2. Whether the Court of Appeals' interpretation of Section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8), is contrary to the plain meaning of the statute.

3. Whether the Court of Appeals failed to give proper deference to the Federal Energy Regulatory Commission in the weighing and interpretation of the evidence.

TABLE OF CONTENTS

Pages

Opinions Below 1

Jurisdiction 2

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 17

Appendix ..... App. 1

TABLE OF AUTHORITIES

Cases

Bayside Enterprises, Inc. v. NLRB, 429 U. S. 298 (1977) 16

Board of Governors v. First Lincolnwood Corp., 439 U. S. 234 (1978) 5

CBS, Inc. v. FCC, 453 U. S. 367 (1981) 5

Chapman v. Houston Welfare Rights Org., 441 U. S. 600 (1979) 15

Colautti v. Franklin, 439 U. S. 379 (1979) 14

Consolo v. Federal Maritime Commission, 383 U. S. 607 (1966) 16

Davis v. United States, 186 F. 2d 938 (9th Cir. 1950) 8

E. I. DuPont de Nemours & Co. v. Collins, 432 U. S. 46 (1977) 16

EPA v. National Crushed Stone Ass'n., 449 U. S. 64 (1980) 5

TABLE OF AUTHORITIES—Continued

Pages

Economy Light & Power Co. v. United States, 256 U. S. 113 (1921) 11, 12

Escondido Mutual Water Company v. FERC, — F. 2d — (9th Cir. Nos. 79-7625, 80-7012, 80-7110, November 2, 1982) 6

FCC v. WNCN Listeners Guild, 450 U. S. 582 (1981) 5

FPC v. Union Electric Co., 381 U. S. 90 (1965) 15

Hardy Salt Co. v. So. Pacific Transportation Co., 501 F. 2d 1156 (10th Cir. 1974), *cert. denied sub nom. Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co.*, 419 U. S. 1033 (1974) 9

INS v. Wang, 450 U. S. 139 (1981) (per curiam) 16

Kaiser Aetna v. U. S., 444 U. S. 164 (1979) 8, 9

Minnehaha Creek Watershed District v. Hoffman, 597 F. 2d 617 (8th Cir. 1979) 9

Montana Power Co. v. FPC, 185 F. 2d 491 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951) 8, 11, 12, 15

NLRB v. Pipefitters, 429 U. S. 507 (1977) 16

National Wildlife Federation v. Alexander, 613 F. 2d 1054 (D. C. Cir. 1979) 9, 15

Permian Basin Area Rate Cases, 390 U. S. 747 (1968) 16

Philbrook v. Glodgett, 421 U. S. 707 (1975) 15

TABLE OF AUTHORITIES—Continued

Pages

Puget Sound Power & Light Co. v. FERC, 644 F. 2d 785 (9th Cir. 1981) 8, 9, 10

Pullman-Standard v. Swint, 102 S. Ct. — (1982) 7

Ralston Purina Co. v. Louisville & Nashville R. Co., 426 U. S. 476 (1976) 16

Reiter v. Sonotone Corp., 442 U. S. 330 (1979) 14

Rochester Gas & Electric Corp. v. Federal Power Commission, 344 F. 2d 594 (2d Cir. 1965) 7, 8, 9

Steelworkers v. Weber, 443 U. S. 193 (1979) 15

The Steamer Daniel Ball v. U. S., 77 U. S. 557 (1871) 9, 11

U. S. v. Appalachian Electric Power Co., 311 U. S. 337 (1940) 11, 12

U. S. v. The Steamer Montello, 87 U. S. 430 (1874) 9

Wilson v. Omaha Indian Tribe, 442 U. S. 653 (1979) 14

STATUTES

Section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8) 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15

28 U. S. C. § 1254 (1) 2

MISCELLANEOUS

H. Rep. No. 910, 66th Cong., 2d Sess. 7 (1920) 13

Section 10 of the Rivers and Harbors Act of 1899, 33 Stat. § 403 9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pyramid Lake Paiute Tribe of Indians respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 20, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 681 F. 2d 1134 (9th Cir. 1982) and is reproduced in App. 1-14. The opinions of the Federal Energy Regulatory

Commission are reported at 18 FPS 5-922 and 21 FPS 5-242 respectively. Both are reproduced in App. 14-28, 29-93.

JURISDICTION

The judgment of the Court of Appeals was entered July 20, 1982. A timely petition for rehearing filed by the Pyramid Lake Paiute Tribe was denied on August 27, 1982. A timely petition for rehearing filed by the Federal Energy Regulatory Commission was denied on September 30, 1982, and this petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

STATUTE INVOLVED

Section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8) provides:

> (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or

rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; . . .

STATEMENT OF THE CASE

Petitioner seeks summary reversal of the decision of the Ninth Circuit Court of Appeals finding the Truckee River *not* to be a navigable water within the meaning of Section 3 (8) of the Federal Power Act.

The Truckee River in Nevada and California is the lifeline of the Pyramid Lake which is located within the Pyramid Lake Indian Reservation. The Lake's fishery is the principal source of livelihood of the Pyramid Lake Paiute Tribe, and the Truckee River provides fresh water recharge to the Lake and serves as a spawning and rearing ground for the fishery. The Truckee River originates in California as the outlet to Lake Tahoe, a natural alpine lake located in both California and Nevada, and flows for approximately 33 miles northeasterly across the California/Nevada stateline and then for approximately 80 miles in Nevada before emptying into Pyramid Lake which is entirely encompassed within the Pyramid Lake Indian Reservation.

The Tribe filed a petition and complaint before the Federal Power Commission, now the Federal Energy Regulatory Commission, in 1975 seeking an order that four hydro-electric power plants owned and operated by Sierra

Pacific Power Company on the Truckee River were operating illegally without a license. The asserted basis for the Commission's jurisdiction, among others, was that the Truckee River is navigable within the meaning of section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8).[1] The Tribe's interest was based on its contention that the power plants are operating in a manner detrimental to the maintenance and preservation of the Truckee River and Pyramid Lake fisheries.[2]

In two detailed and comprehensive opinions, App. 14-28, 29-93, the Commission found the Truckee River to be navigable and Sierra Pacific's four power plants on the river subject to the Commission's licensing jurisdiction. Sierra Pacific sought review of the Commission's decisions by the Ninth Circuit Court of Appeals. On review, the Ninth Circuit reversed and remanded the Commission's decision and orders. The Court focused on the specific stateline reach of the river and found that although the Truckee is a navigable intrastate waterway, App. 12, it is not a navigable water of the United States because there was no substantial evidence that the stateline portion of the river was either used or suitable for use for navigation purposes. App. 10-11. The court also found that the interstate portion of the river did not qualify as an interruption com-

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[1]The Commission staff supported the Tribe's position on the navigability of the Truckee and the jurisdiction of the Commission.

[2]The issue of the Pyramid Lake Paiute Tribe's right to sufficient water to maintain the Pyramid Lake fishery is being pursued in State of Nevada, et al. v. United States, et al., Nos. 81-2245, 81-2276 and 82-38, certiorari accepted, 51 U. S. L. W. 3287 (Oct. 12, 1982).

pelling land carriage under section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8), because it found no substantial evidence of actual use of the interstate portion of the river or any instances of commerce across the state-line with the aid of portages. App. 12. Finally, the court declined to find the improvements authorized on the Truckee were adequate to bring the Truckee within the meaning of section 3 (8) and therefore navigable in law because the improvements were for flood control or reclamation, not navigation. App. 13-14.

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REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's decision totally ignores the controlling principles of statutory construction applicable to this case and reaches a result that is inconsistent with those principles.

Numerous decisions of this Court establish that courts are required to give "great deference" to interpretations by administrative agencies of the statutes they are required to administer. *E. g., EPA v. National Crushed Stone Ass'n.*, 449 U. S. 64, 83 (1980). *See also, CBS, Inc. v. FCC*, 453 U. S. 367, 382 (1981); *FCC v. WNCN Listeners Guild*, 450 U. S. 582, 598 (1981) (construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong). This is most especially true when an agency is interpreting the scope of its authorizing statute. *Board of Governors v. First Lincolnwood Corp.*, 439 U. S. 234, 251 (1978).

The Ninth Circuit's decision does not even pay lip service to these fundamental canons of construction. They are not mentioned in its opinion. It is clear that the court simply adopted its own interpretations of section 3 (8) of the Federal Power Act, as if it were writing on a clean slate. Thus, for example, in rejecting the Commission's position that any improvements authorized by Congress under its commerce powers are sufficient to bring the waterway within the definition of section 3 (8), the Court of Appeals simply stated that "[w]e do not adhere to the Commission's view." App. 13. Similarly, the Court of Appeals acknowledged that the stateline reach of the Truckee River "arguably fits [the] description" in section 3 (8) of an interruption between navigable parts of the Truckee River, but went on to express its disagreement with the Commission's construction of its governing statute. App. 12.

The lower court never even looked for, no less found, any "compelling indication" that the Commission's interpretations are wrong or unreasonable. No such conclusions could have been reached since the Commission's positions are consistent with the plain meaning of section 3 (8) and the overall purpose of the Federal Power Act and are supported by several additional canons of construction. *See infra* at pp. 14-15.

The Court of Appeal's departure from the well-established rules governing judicial review of an administrative agency's construction of its own governing statute is demonstrated rather starkly by a subsequent decision rendered by a different panel of the same court. In *Escondido Mutual Water Company v. FERC*, — F. 2d — (9th Cir. Nos.

79-7625, 80-7012, 80-7110, November 2, 1982), the Ninth Circuit upheld the Commission's jurisdiction over a water diversion project that generates a miniscule amount of power. The court affirmed the Commission's "very expansive reading" of the Federal Power Act because the Commission's view was entitled to "great deference" and is not "so unreasonable as to require reversal."[3] Application of these same standards to the case at bar obviously would have produced a different result. *Cf. Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982) (court of appeals belatedly acknowledged controlling standard of review but its opinion reflects that it did not accord proper deference to the district court's findings).

This Court should grant this petition and summarily reverse the Ninth Circuit's judgment with instructions to give great deference to the Commission's interpretations of the Federal Power Act and to uphold those interpretations if they are found to be reasonable.

2. The Ninth Circuit's decision conflicts with decisions of other circuits construing section 3 (8) of the Federal Power Act. The Ninth Circuit's interpretation of section 3 (8) which focuses only on the navigability of the stateline reach of the river stands alone among the decisions in determinations of the navigable waters of the United States. The court's analysis is directly contrary to decisions of other circuits and to other decisions of the Ninth Circuit itself. *See Rochester Gas & Electric Corp. v. Federal Power Commission*, 344 F. 2d 594, 597 (2d Cir.

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[3]The relevant portion of this as yet unpublished opinion is reproduced in the Appendix to this Petition. App. 94-100.

1965); *Montana Power Co. v. FPC*, 185 F. 2d 491 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951); *Puget Sound Power & Light Co. v. FERC*, 644 F. 2d 785 (9th Cir. 1981). These cases show that while an interstate linkage by water is a prerequisite, the navigability of the specific stateline reach is not the determining factor for a finding that the river is a navigable water of the United States. In none of these cases did the status of the river rise or fall on the basis of the navigability of the specific stateline portion.

Indeed, section 3 (8) of the Federal Power Act specifically refers to *"those parts of streams* . . . [which] are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. . . ." (Emphasis added.) And the Commission's jurisdiction has been upheld over hydroelectric plants located on parts of streams that support only intrastate navigation. *Rochester Gas & Electric Co. v. FPC*, 344 F. 2d 594 (2d Cir. 1965); *Montana Power Co. v. FPC*, 185 F. 2d 491 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951).

An interstate connection is necessary for the Commission to exercise jurisdiction and such a connection exists in this case by virtue of the fact that the Truckee River flows from California to Nevada.[4] This is sufficient to establish its interstate status. *See Kaiser Aetna v. U. S.*, 444 U. S. 164, 166-167 (1979) (the body of water at issue was a navigable water of the United States because of its

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[4]In addition, the Truckee flows out of Lake Tahoe which is itself a navigable water of the United States. Davis v. United States, 186 F. 2d 938 (9th Cir. 1950). If the Truckee River is otherwise navigable then it is a navigable water of the United States by virtue of its connection with Lake Tahoe.

connection with the Pacific Ocean); *The Steamer Daniel Ball v. U. S.*, 77 U. S. 557 (1871) (the Grand River is located entirely within the borders of the Michigan but empties into Lake Michigan and is thus a navigable water of the United States); *U. S. v. The Steamer Montello*, 87 U. S. 430 (1874) (the Fox River located in Wisconsin empties into Green Bay, thus forming a continued highway for interstate commerce); *Puget Sound Power & Light Co. v. FERC*, 644 F. 2d 785, *supra* (the White River is a navigable water of the United States presumably because of its connection with Puget Sound); *Rochester Gas and Electric Co. v. FPC*, 344 F. 2d 594, *supra* (the Genesee River arises in Pennsylvania, flows through New York to Lake Ontario and it is thus a navigable water of the United States).[5]

Neither is it necessary for actual commerce to take place across the stateline. As the court said in *Rochester Gas and Electric*, 344 F. 2d at 597:

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[5]The cases relied on by the court involved waterways which were wholly intrastate. See National Wildlife Federation v. Alexander, 613 F. 2d 1054, 1058-61 (D. C. Cir. 1979) (involved Devils Lake, a natural lake wholly within the State of North Dakota); Hardy Salt Co. v. So. Pacific Transportation Co., 501 F. 2d 1156, 1167 (10th Cir. 1974), *cert. denied sub nom.* Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co., 419 U. S. 1033 (1974) (involved the Great Salt Lake, a navigable lake wholly within the State of Utah); and Minnehaha Creek Watershed District v. Hoffman, 597 F. 2d 617, 623 (8th Cir. 1979) (involved Lake Minnetonka located wholly within the State of Minnesota). The latter case also involved Minnehaha Creek, a creek located entirely within Minnesota but which eventually flows into the Mississippi River. In this regard, the holding in *Minnehaha Creek* may be in conflict with this court's decisions in Kaiser Aetna v. U. S., 444 U. S. 164 (1979) and The Steamer Daniel Ball v. U. S., 77 U. S. 557 (1871), but in any event, the case involved the different language of Section 10 of the Rivers and Harbors Act of 1899, 33 Stat. § 403.

> Petitioner also contends that there is no evidence that goods shipped down river entered into interstate commerce. Perhaps the Commission was justified in inferring that some of these goods eventually must have crossed state or national boundaries. In any event, we agree with the Commission that actual use of a river for intrastate shipments demonstrates its suitability for use as a connecting waterway for interstate or foreign commerce. Especially is this true where the river runs directly into acknowledged avenues of interstate or foreign commerce, here the Erie Canal and Lake Ontario.

See also, Puget Sound Power & Light Co. v. FERC, supra.

Allowing the Ninth Circuit's decision to stand would cast doubt on the Commission's jurisdiction over countless projects located on waterways on which the stateline reach was not actually used for river transportation or where there are rapids, falls, or other interruptions to interstate navigation located above and below the projects.

3. The Ninth Circuit's decision also conflicts with the plain meaning of section 3 (8) which defines "navigable waters" as including "interruptions between the navigable parts." Such interruptions are specifically included as part of the navigable waterway and within the jurisdiction of FERC.[6]

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[6]FERC determined that a fourteen mile stretch of the river which included the stateline portion is navigable in fact or suitable for navigation. App. 65, 69-71. In the alternative, the Commission determined that the 14 mile stateline stretch qualifies as an interruption between navigable parts. App. 67. Only two of Sierra Pacific's plants are located on the stateline portion examined by the Commission. The other two plants are located on other portions of the river which the Commission found, and the Ninth Circuit acknowledged, are navigable. App. 64-65.

The court conceded that the stateline reach of the Truckee "arguably fits this description" but declined to find the area within FERC jurisdiction because it concluded that the stateline reach was not navigable in fact. App. 12. The court's holding is simply contrary to the plain meaning of the statute which includes "interruptions between the navigable parts."[7]

The consideration of this issue in the Court of Appeals' opinion is flawed because it incorrectly assumes that there must be actual evidence of portage or land carriage. App. 12. The statute does not impose such a requirement. It merely describes "interruptions . . . compelling land carriage," as opposed to referring, for example, to "interruptions . . . which have compelled land carriage." The definition as a whole is inconsistent with a requirement for proving actual land carriage because section 3 (8) expressly encompasses not only parts of streams that have actually been used as highways for interstate or foreign commerce, but also parts of streams that are "suitable" for such use.

The stateline interruption between the navigable portions of the Truckee River is suitable for land carriage and therefore qualifies as an "interruption . . . compelling land carriage." The Commission so held. App. 66-67. That holding is supported by prior case law. *Montana, supra,* relying on *Economy Light & Power Co. v. United States,* 256 U. S.

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[7]The court's holding is also contrary to that part of the definition in section 3 (8) which includes not only waterways which are navigable in fact, but those suitable for navigation. See The Steamer Daniel Ball, *supra,* and U. S. v. Appalachian Electric Power Co., 311 U. S. 337, 407-408 (1940).

113, 122 (1921), and *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 408-09 (1940), held that an "interruption . . . compelling land carriage" did not deny a portion of a river its status as a "navigable water." The *Montana* court did not require any actual evidence of land carriage. 185 F. 2d at 494. The Commission expressly relied on that same statement from *Economy Light*. App. 59 n. 45.

The Court of Appeals' decision is inconsistent with these authorities insofar as it insists on actual proof of land carriage. Further, the Commission's interpretation of this portion of its governing statute is not clearly outside of its authority and is plainly a reasonable construction even if it is not the only reasonable one. Accordingly, it is entitled to substantial deference and should be followed. *See supra* at pp. 5-7.

The legislative history of section 3 (8) confirms the meaning of the words in the statute. The definition in section 3 (8) was specifically amended to include nonnavigable parts of streams that interrupt navigable parts.

> This amendment recasts the House defintion as to the term "navigable waters," the House agreeing to the Senate definition with an amendment inserting after the word "interruptions" the words "between the navigable parts of such streams or waters," thus making it clear that *although the navigable parts of such streams may be interrupted by falls, shallows, or rapids, the portions occupied by falls, shallows, or rapids are within the jurisdiction of Congress and that no dams can be constructed at, upon, or across such falls, shallows, or rapids, without securing a license as provided in the bill.* Under the House definition of "navigable waters" it might be possible to construct dams at the very point where dams would

have to be located without securing such license. (Emphasis added.)

H. Rep. No. 910, 66th Cong., 2d Sess. 7 (1920).

Congress obviously contemplated situations where there may be non-navigable portions of an otherwise navigable stream and chose to include them within the definition of navigable waters. Congress was aware that it is in the nature of hydroelectric power plants that the most advantageous locations on a river to construct such plants are precisely those areas of steep gradient and swiftly moving waters. A sharp drop between the point of diversion of the water to the powerhouse is an essential element in the generation of the power. It is natural then that power plants should be located in these areas of falls or rapids or other steep parts of a river, areas which are not often conducive to navigation. Yet, if these areas were not included within the definition of navigability, FERC would not have jurisdiction over a significant number of those power plants which are constructed in the most suitable locations.

4. The Ninth Circuit's decision also conflicts with the plain meaning of that part of section 3 (8) which includes those parts of rivers which "have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation of its authority."[8] The Court held that flood control and reclamation improvements are not encompassed within this part of the definition, al-

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[8]As an alternative ground for finding the Truckee River navigable, the Commission found that the stateline reach of the river had been "authorized by Congress for improvement by the United States." App. 74-80.

though the provision is not limited to navigational improvements.

The definition of navigable waters in section 3 (8) includes both those "parts of streams . . . which in their natural or *improved* condition . . . are used or suitable for use for the transportation of persons or property in interstate or foreign commerce . . . *together with such other parts of streams* as shall have been authorized by Congress for improvement." (Emphasis added.) The first "improved" clause clearly refers to navigational improvements, but the second "improvement" clause obviously includes portions of streams other than those that are used or suitable for use in interstate or foreign commerce. To find otherwise, as the Ninth Circuit did, would render the second "improvement" clause meaningless and superfluous. To give any meaning at all to the "improvement" clause, it must refer to other kinds of improvements than navigational improvements.[9]

The court's decision also conflicts with the overall purpose of the Federal Power Act:

> to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; *these uses included navigation, irrigation, flood control, and very prominently, hydroelectric power--uses*

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[9]Such an interpretation would comport with the rule that a court must give effect, if possible, to every word Congress used and must avoid interpretations that render a provision superfluous and drain it of all significance. Wilson v. Omaha Indian Tribe, 442 U. S. 653, 665-66 (1979); Reiter v. Sonotone Corp., 442 U. S. 330, 339 (1979); Colautti v. Franklin, 439 U. S. 379, 392 (1979).

> *which, while unregulated, might be contradictory rather than harmonious.*

FPC v. Union Electric Co., 381 U.S. 90, 98 (1965) (emphasis added). The Court's limiting construction of section 3 (8) undermines the Act's purpose by unnecessarily excluding projects from the Commission's jurisdiction that are well within the federal government's constitutional powers. This contravenes another vital canon of construction, that the purpose of the statute controls even its literal language. *Steelworkers v. Weber* 443 U.S. 193, 201-02 (1979); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 607-08 (1979); *Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975).[10]

In sum, the Court of Appeals' application and interpretation of the improvements clause of section 3 (8) should be rejected because: (i) it is not in accord with its plain meaning; (ii) it renders part of section 3 (8) meaningless and superfluous; (iii) it conflicts with the statute's overall purpose; and (iv) it totally ignores and gives no deference at all to the Commission's construction of its own governing statute.

5. Finally, review is appropriate in this case because the court below failed to give proper deference to FERC

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[10]The authority cited by the Court of Appeals does not support its interpretation of Section 3 (8). In Montana Power Co. v. FPC, 185 F. 2d 491, 495 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951), the only relevant improvement authorized by or recommended to Congress qualified as an aid for navigation. Consequently, the court did not consider or decide whether other kinds of improvements are encompassed in the definition. And to the extent that an interstate connection is required for the provision to be operable, see National Wildlife Federation v. Alexander, *supra*, it exists here. See discussion above at p. 8.

in the weighing of the evidence. Here, the court reweighed and re-interpreted the evidence. In doing so, the court went far beyond its "essentially narrow and circumscribed" role in reviewing agency decisions. *Permian Basin Area Rate Cases*, 390 U. S. 747, 766 (1968).

The court selectively reviewed the evidence relied on by the Commission to find the stateline reach of the river to be navigable in fact or suitable for navigation. *Compare* the Commission's analysis of this portion of the river, App. 44-71, with the court's analysis, App. 10-11. On the basis of this selective review of the evidence, the court declined to follow the Commission's ruling that the stateline reach is navigable in fact. App. 10. Suitability for navigation was similarly dismissed although no examination of the evidence on improvements was made. App. 10-11.

The weighing of the evidence is primarily the task of the agency, *Ralston Purina Co. v. Louisville & Nashville R. Co.*, 426 U. S. 476 (1976), and the agency's conclusions must be respected even if "the issue might 'with nearly equal reason be resolved one way rather than another.'" *Bayside Enterprises, Inc. v. NLRB*, 429 U. S. 298, 301 (1977). *See Consolo v. Federal Maritime Commission*, 383 U. S. 607, 620 (1966). The court did not find the agency's interpretation unreasonable, but instead "improperly substituted its own view of the facts for those of the [Commission]." *NLRB v. Pipefitters*, 429 U. S. 507, 532 (1977). *See also, INS v. Wang*, 450 U. S. 139, 144 (1981) (per curiam); *E. I. DuPont de Nemours & Co. v. Collins*, 432 U. S. 46, 54-57 (1977).

CONCLUSION

For the reasons stated the Court is respectfully requested to grant a writ of certiorari.

Respectfully submitted,

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December, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-7453

SIERRA PACIFIC POWER COMPANY,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

OPINION

(Filed July 20, 1982)

On Petition To Review Orders Of
The Federal Energy Regulatory Commission

Argued and Submitted January 13, 1982

Before: TRASK, SNEED and TANG, Circuit Judges

TRASK, Circuit Judge:

Petitioner, Sierra Pacific Power Company (Sierra), challenges a ruling made by respondent, the Federal Energy Regulatory Commission (Commission or FERC), which found the Truckee River to be a navigable water of the United States as defined by Section 3 (8) of the Federal Power Act, 16 U. S. C. § 796 (8), and ordered Sierra to obtain a license pursuant to sections 4 (e) and 23 (b) of the Act, 16 U.S.C. §§ 797 (e), 817, to operate its hydroelectric power projects along the Truckee. In addition, petitioner asserts that it was denied a fair hearing because the Commission failed to provide adequate notice of the issues that would be decided in the jurisdictional hearing. In particular, Sierra contends it was not notified that the Commission would consider the scope

of the project to be licensed or the issue of "hydraulic coordination" between Sierra's facilities.

We conclude that the Truckee is not a navigable water of the United States because it lacks a navigable interstate linkage by water. *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 622-24 (8th Cir. 1979). The Truckee is not a "continu[ous] highway over which commerce is or may be carried on with other States . . . ." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Because we decide that the river fails to meet the criteria for navigability, thus precluding FERC regulation, we do not reach the question of whether Sierra was afforded a fair hearing on hydraulic coordination and whether Independence and Donner Lake Reservoirs were waters incidental to electric power development. Because the Commission's exercise of licensing jurisdiction hinged on the purported navigability of the Truckee, we reversed the Commission's order requiring Sierra to obtain a license for its hydroelectric power facilities.

I. Description of the Truckee River

The Truckee River begins at Lake Tahoe, California, and flows northeastwardly for 110 miles terminating at Pyramid Lake, Nevada. Sierra operates four hydroelectric plants along a fourteen-mile portion of the river beginning approximately twenty-seven river miles from the Truckee's source at Lake Tahoe, or six miles upstream from the point where the Truckee crosses from California

into Nevada.[1] Pyramid Lake is located entirely within the Pyramid Lake Indian Reservation.

The Truckee descends the eastern side of the Sierra Mountains with an average gradient of twenty-five feet per mile. Most of the drop occurs during the first forty-seven miles of the river's course, between Lake Tahoe and Reno. Petitioner states that the stretch of the river on which its power plants are located descends at an average slope of forty-five feet per mile. This gradient, Sierra contends, is substantially greater than in any area above or below its power plants. Opening Brief for Petitioner at 7. FERC asserts that Sierra's description is inaccurate and states that the fourteen-mile portion where Sierra operates its plants descends at a rate of thirty-five feet per mile, similar to the gradient upstream from Sierra's projects. Brief for Respondent at 3. The Commission's findings indicate that the gradient does increase along the portion of the Truckee where Sierra's plants are situated and that the steepest drop of 100 feet per mile occurs in the boulder-filled one-half mile stretch above Floriston at river mile twenty-seven.[2]

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1 The four plants operated by petitioner are:

Plant	Capacity	Year Constructed
Farad	2800 kw	1899
Fleish	2000 kw	1905
Verdi	2400 kw	1911
Washoe	1500 kw	1904

2 In Opinion No. 61, the Commission provided the following description of the Truckee's course:

> The gradient of the Truckee River is negligible for the first 3 miles from the Lake Tahoe outlet dam. There are rocky passages for the next 2 to 3 miles to

(Continued on next page)

The river varies in width from 50 feet to 150 feet and the average depth varies from one and one-half feet to four feet. The average flow of water in the Truckee during the years 1900 to 1975 was 249 cubic feet per second. But the flow varies widely from year to year and during each year; the flow is normally greater in the spring and fall.

II. Administrative Proceedings

In July 1975, the Pyramid Like Paiute Tribe of Indians (Tribe) instituted a proceeding before the Commission seeking a ruling that Sierra must obtain a license

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(Continued from previous page)

Squaw Creek, and the gradient descends 40 feet per mile, but for the next 9 miles to Truckee at river mile 14 there are fewer rocks and the gradient decreases to 30 feet per mile. Donner Creek flows into the Truckee River in that reach at about river mile 12.5. For the next 10 miles the gradient continues to descend at 30 feet per mile, there are rocky passages and the Truckee is joined by Martis Creek at river mile 17, Prosser Creek at river mile 20 and the Little Truckee River at Boca at river mile 21.5. And for the next 6 miles to Floriston at river mile 27, the gradient descends at 25 feet per mile for 5.5 miles until two long boulder-filled drops are reached in the last half mile, where the gradient is 100 feet per mile. Juniper Creek flows into the Truckee River in the beginning of that reach at about river mile 23.

For the next 9 miles to Verdi at river mile 36, passing Sierra's Farad and Fleish facilities together with its verdi diversion dam and part of its Verdi conduit, the gradient descends at 35 feet per mile and the river is rocky, particularly in the reaches where the diversions reduce the flows. Just beyond that reach, at about river mile 37, Dog Creek flows into the Truckee River (footnotes omitted).

ER 31-32. The Commission's discussion of the gradient of the Truckee does not extend beyond river mile thirty-seven.

under the Federal Power Act to operate its power plants on the Truckee. Specifically, the Tribe alleged that the Truckee is a navigable water of the United States as defined in section 3 (8) of the Federal Power Act, 16 U.S.C. § 796 (8), and that Sierra's power plants are therefore subject to FERC's licensing jurisdiction. The Tribe indicated that the rates of flow of water were not sufficient to maintain the Tribe's fisheries in the Truckee and Pyramid Lake and that requiring Sierra to obtain a license for its plants would enable the rates of flow to be adjusted to improve the quality of fishing.

On January 14, 1977, the Commission set the matter for hearing. Pursuant to this order, a hearing was held on May 31, 1977, in Reno, Nevada. The Commission staff, the Tribe and intervenors United States Department of Interior and the State of Nevada submitted various exhibits and other evidence concerning the past use and suitability for use of the Truckee River for floating logs to sawmills. In addition to the evidence presented at the hearing, the Administrative Law Judge (ALJ) toured the Truckee River and visited one of Sierra's power plants. On November 25, 1977, the ALJ issued an Initial Decision in which he found that the evidence failed to establish that the Truckee was a navigable water of the United States and that the Commission therefore lacked jurisdiction over Sierra's power plants. Excerpt of Record at 14-15.

In Opinion No. 61 issued on August 10, 1979, the Commission reversed the ALJ's decision regarding the navigability of the Truckee. In its ruling, the Commission relied on cases interpreting section 3 (8) of the Federal Power Act which defines navigability for pur-

poses of FERC's jurisdiction.[3] The Commission indicated that a waterway is navigable if it is presently used or is suitable for use as a highway for interestate commerce, or if it has been used to transport goods or persons in commerce in the past, or if it could be made suitable for such use in the future by reasonable improvements. ER 38, *citing United States v. Appalachian Electric Power Co.*, 331 U.S. 377 (1940); *Rochester Gas and Electric Corporation v. Federal Power Commission*, 344 F.2d 594, 596 (2d Cir.), *cert. denied*, 382 U.S. (1965). Applying this standard, the Commission held the Truckee to be navigable and ordered Sierra to obtain a license for the operation of its power plants.

After deciding the issue of jurisdiction, the Commission also determined the scope of the project subject to licensing. Sierra was ordered to include its Independence Lake reservoir in its license application. In addition, Sierra and the Truckee-Carson Irrigation District were ordered to show cause why a license should not be

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[3] As defined in section 3(8) of the Federal Power Act, 16 U. S. C. § 796 (8), navigable waters include:

> Those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

required for their jointly-owned Donner Lake reservoir. Subsequently, in Opinion No. 61-A issued in August 1980, the Commission denied Sierra's petition for rehearing and a request for stay of FERC's opinion pending appeal. The Commission found that Sierra failed to show cause why the Donner Lake reservoir did not require a license. Sierra was ordered to file its license application by February 8, 1981.

III. Navigable Waters of the United States

We find that no substantial evidence supports the Commission's finding that the Truckee River meets the criteria for navigable waters of the United States.

Section 23 (b) of the Federal Power Act, 16 U.S.C. § 817, provides that hydroelectric power projects "across, along or in any of the navigable waters of the United States" must be licensed by FERC. Section 3 (8) of the Act defines "navigable waters" to include the portions of streams or waterways which either in their natural or improved condition, notwithstanding non-navigable interruptions that might require "land carriage," are used or suitable for use in transporting goods or persons in interstate commerce. 16 U.S.C. § 796(8); *see* n. 3, *supra*. Any "interrupting falls, shallows, or rapids" occurring along an otherwise navigable stream together with any portions of the waterway authorized by Congress for improvement are included as navigable waters under section 3 (8). *Id.*

The Supreme Court has defined navigable waters of the United States, as opposed to navigable waters of a

State,[4] as waterways that form "in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870). Later decisions have broadened the definition of navigability to include bodies of water which were navigable in their natural state although they may not presently meet the criteria, *Economy Light & Power Co. v. United States,* 256 U.S. 113, 123 (1921), and those which might be made navigable with reasonable improvements. *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 407-08 (1940).

In addition, the Supreme Court requires a navigable interstate linkage by water. In *The Montello,* 78 U.S. (11 Wall.) 411, 415 (1870), the Court stated:

> If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, *and is only navigable between different places within the State,* then it is not a navigable water of the United States, but only a navigable water of the State. . . .

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4 Portions of the Truckee River have been declared or assumed navigable waters of the state by the California legislature and various Nevada courts. *See* Act of April 4, 1870, ch. 513, 1869-1870 Cal. Stats. 771 (1870); *Reno Brewing Co. v. Packard,* 31 Nev. 443 (1909) (title dispute); *Shoemaker v. Hatch,* 13 Nev. 261 (1878) (title dispute); *Boardman v. Lake,* 8 Nev. 276 (1873) (tollbridge franchise dispute). We decide nothing here that would disturb those rulings. Rather, our holding is that the Truckee is not a navigable water *of the United States.*

(emphasis added); *National Wildlife Federation v. Alexander,* 613 F.2d 1054, 1058-61 (D.C. Cir. 1979); *Minnehaha Creek Watershed District v. Hoffman,* 597 F. 2d 617, 623 (8th Cir. 1979); *Hardy Salt Co. v. Southern Pacific Transportation Co.,* 501 F.2d 1156, 1167 (10th Cir.) *cert. denied sub nom Sanders Brine Shrimp Co. v. Southern Pacific Transportation Co.,* 419 U.S. 1033 (1974).

The record in this case clearly shows that the Truckee has been used for floating logs to lumber mills in California from its source at Lake Tahoe to Boca at river mile twenty-three, and in Nevada from river mile thirty-seven to river mile fifty-two. To find the Truckee a navigable water of the United States, FERC must demonstrate: (1) that the middle stretch of the river which crosses from California into Nevada, approximately from river mile twenty-three to river mile thirty-seven, has been used or is suitable for use for the transportation of property; or, (2) that this state-line reach of the river is an "interruption . . . compelling land carriage;" or, (3) that improvements authorized by Congress on the Truckee exist where the power plants are located.

A. *Use or Suitability for Use*

For the Truckee to be navigable, use of the river need not be extensive, or long and continuous. *Puget Sound Power & Light v. FERC,* 644 F.2d 785, 789 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 596 (1981). Downstream flotation of shingle bolts is sufficient evidence to support a finding of navigability. *Id.* at 789-90. But the transportation of property or persons must be interstate. *E.g., The Montello, supra.*

The evidence concerning use or suitability for use of the state-line reach is less than substantial. *See* Brief for Respondent at 29-31; Brief for Intervenors (the Tribe) at 21-22. In support of its finding of navigability, the Commission noted that in 1865 the Eastman Mill near Reno was reported to have contracted for a large quantity of logs which "probably" were cut upstream in California and driven from river mile twenty-three across the state line. ER 54-55. The Commission also relied on a newspaper account indicating that in 1878 timbers for the Comstock mine were driven "a considerable distance" down the Truckee to Reno. Because the same newspaper a few months previously had reported two thirteen-mile log drives from Verdi to Reno, the Commission reasoned that the "considerable distance" in the later account must have started from a point upstream from Verdi in California. ER 55-56. This evidence is tenuous at best and does not support a finding that the state-line reach of the Truckee was used for transporting timber.

Evidence of the Truckee's suitability for use is also insubstantial. In addition to the evidence of actual use discussed above, FERC relied upon an asserted absence of evidence that the navigable character of the river changes along the state-line reach. ER 59 n.52. Yet the Commission acknowledges that a "possibly significant obstruction to navigation" exists in the half mile before river mile twenty-seven: two long boulder-filled drops are found in this stretch and the gradient is 100 feet per mile. ER 59; *See also* ER 32. The first of Sierra's facilities, Farad power plant, is located just below river mile twenty-seven, and the Commission's opinion confirms that the gradient of the Truckee throughout the next four-

teen miles where Sierra's plants are situated is greater than the incline upstream from Sierra's developments. ER 31-32. Although a river may be considered suitable for transportation of property if it could be made so by reasonable improvements, *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-08 (1940), the evidence does not indicate that the state-line reach of the Truckee could be improved for navigation at reasonable cost.[5]

B. *Interruption Compelling Land Carriage*

Even assuming that the state-line reach of the Truckee is not navigable in fact, the Commission indicated that this portion of the river qualifies as an interruption between navigable parts of the river. ER 59. Under section 3 (8) of the Federal Power Act, 16 U.S.C. § 796(8), a stream may retain its navigable status despite the occurrence of non-navigable interruptions which require portaging or "land carriage" to circumvent them. *See* n. 3, *supra*. Congress included these "interruptions"

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5 Sierra's brief states that:

> The major sources of lumber and the principle sawmills along the Truckee River were located upstream from River Mile 23. So long as its rates remained reasonable, the railroad provided an efficient, economical mode of transportation of lumber from the sawmills to the markets. Because the forests below River Mile 23 were less dense and farther from the river valley, there was no lumbering on the portion of the river between River Mile 23 and River Mile 37. Therefore, . . . the improvement of the Truckee River below Boca in order to permit the transportation of logs and lumber, even if physically possible, would have been of very little value.

(citations to record omitted). Opening Brief for Petitioner at 32.

within the statute's definition of navigability in order to prevent the steep gradients, falls, shallows and rapids that frequently occur at hydroelectric generation sites from themselves becoming a bar to FERC jurisdiction if the stream is otherwise navigable. *See* H.R. Rep. No. 910, 66th Cong. 2d Sess. 7 (1920) (Conference Report).

Although the state-line reach of the Truckee arguably fits this description, we find that this portion of the river cannot be considered an "interruption" under section 3 (8) because the river itself does not form a "continuous highway" for commerce between the states. The record shows that logs were placed in the Truckee and floated downstream to sawmills located in California above river mile twenty-three and that similar use was made of the river in Nevada below river mile thirty-seven. But we find no substantial evidence that the lumber industry utilized the middle portion of the river which crosses the border between the two states. Logs were not floated from California to Nevada on the Truckee. Nor is there any evidence that property or persons ever traveled downstream across the state-line reach of the Truckee with the aid of a portage or "land carriage." The evidence shows the Truckee is only navigable intrastate which does not satisfy the criteria for a navigable water of the United States. *The Montello,* 78 U.S. (11 Wall.) 411, 415 (1870).

C. *Authorized or Recommended for Improvement*

As an alternative ground for finding the Truckee navigable, the Commission noted that the state-line reach of the river has been "authorized by Congress for improvement by the United States." ER 68-69. Section 3 (8) of the Federal Power Act provides that portions of

streams authorized for improvement or recommended to Congress for improvement after investigation under its authority are included within the Act's definition of navigability. 16 U.S.C. § 796 (8).

We find that the improvements cited by the Commission are inadequate to make the Truckee navigable. All the projects involve flood control or reclamation. In *Montana Power Co. v. Federal Power Commission*, 185 F. 2d 491, 495 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951), the court interpreted section 3 (8) to refer to improvements authorized by Congress to facilitate navigation. We do not adhere to the Commission's view that any improvements authorized by Congress under its commerce powers are sufficient to render a waterway navigable in law. *See* ER 69. The authority cited by the Commission, *United States v. Appalachian Power Co.*, 311 U.S. 377, 426 (1940), does not support its broad argument. In *Appalachian Power*, the Supreme Court discussed the scope of Congress' authority regarding the regulation of navigable waters of the United States and rejected the argument that the constitutional power of the United States to use or regulate navigable waterways is limited to the control of navigation. The Court held that Congress' authority is based in the commerce power and extends beyond the operation of boats and the improvement of the waterway itself: "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control." *Id.* (footnote omitted.) Navigable waters of the United States are subject to regulation under Congress' broad commerce power, but FERC attempts to work this syllogism in reverse. Congress' action

in authorizing flood control and reclamation projects unrelated to navigation does not establish that the Truckee is navigable for purposes of FERC licensing jurisdiction. The Federal Power Act limits FERC's jurisdiction to navigable waters as defined in section 3 (8). Although Congress' authority under the commerce clause might extend to commerce conducted along waters lacking an interstate connection by water, the court in *National Wildlife Federation v. Alexander,* 613 F. 2d 1054, 1059-60 (D.C. Cir. 1979), held that when a statute limits its reach to navigable waters of the United States, it should be construed as applying only to waterways having an interstate connection.

In short, we conclude that the Commission's determination of navigability is not supported by substantial evidence. Accordingly, the decision and orders of the Commission are reversed and remanded.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 61-A

Docket No. E-9530

Pyramid Lake Paiute Tribe of Indians

vs.

Sierra Pacific Power Company

OPINION AND ORDER DENYING REHEARING AND A STAY, AND FINDING THAT CAUSE HAS NOT BEEN SHOWN

Issued: August 8, 1980

PROJECT

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Matthew Holden, Jr., and
George R. Hall.

Docket No. E-9530

Pyramid Lake Paiute Tribe of Indians

vs.

Sierra Pacific Power Company

OPINION NO. 61-A

OPINION AND ORDER DENYING REHEARING AND A STAY, AND FINDING THAT CAUSE HAS NOT BEEN SHOWN

(Issued August 8, 1980)

On September 7, 1979, Sierra Pacific Power Company (Sierra) filed an application pursuant to Section 313(a) of the Federal Power Act and § 1.34 of the Commission's Rules of Practice and Procedure for rehearing of Opinion No. 61, issued August 10, 1979, in which the Commission found that Sierra's Farad, Fleish, Verdi and Washoe developments on the Truckee River are parts of a jurisdictional water power project, together with Sierra's Independence Lake development on a headwater of the Truckee River and the Donner Lake development, on another headwater, owned jointly by Sierra and Truckee-Carson Irrigation District (Irrigation District). On September 10, 1979, the Pyramid Lake Paiute Tribe of Indians (Tribe) and the Secretary of the Interior (Interior),

together, filed a petition for rehearing in the nature of a motion for clarification, which we are treating as such. Upon consideration of the two filings, we find it appropriate to clarify the basis upon which we have found that the six developments named above are parts of a single unit of improvement or development comprising a "project" (as defined in Section 3(11) of the Federal Power Act) which should be licensed as the "Truckee River Project", or under a similar name.

THE UNIT OF IMPROVEMENT OR DEVELOPMENT COMPRISING THE "PROJECT"

The lumbering industry in the Truckee basin was declining at the close of the nineteenth century, and the waters of the Truckee River were put to new uses. In 1899 the Fleischhacker brothers and others organized the Floriston Pulp & Paper Company and began to build a paper mill at Floriston, California, which commenced operations in July 1900 and was said to be the second largest paper mill in the United States. (Exhibit 54, at 43.) From about the same time, 1900, the water stored in Lake Tahoe was released essentially in the manner that was later formalized as the Floriston Rates[1] in the 1915 consent decree. (Tr. 190.)

The storage capacity of Lake Tahoe and the continuous release of its waters[2] were ideal for hydroelectric

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1 500 Cubic feet per second (cfs) from March 1 through September 30 each year, and 400 cfs from October 1 through February 28 (or 29).

2 The flows of the Truckee River would be erratic without regulation at the Lake Tahoe outlet Jam, sometimes far exceeding and sometimes far less than the amounts that can be utilized by Sierra's four power developments. (Tr. 60-61.)

developments which would operate continually and thus serve base loads, as distinguished from peak loads. In 1899 the Farad hydroelectric development was constructed immediately downstream from the site of the Floriston paper mill, and a smaller Reno hydroelectric development[3] was constructed in or near Reno, Nevada. The outlet dam was operated continually for regulating the flow from Lake Tahoe to serve the interests of those power plants (Exhibit 35, at 9)[4], together with the others that were constructed between 1904 and 1911.

In or about 1902 or 1903 the heirs of the incorporators of Donner Lumber & Boom Company began to demand payment from the users of the Truckee River waters for the Lake Tahoe storage and control. (Exhibit 35, at 10). And their demands resulted in the purchase by the Fleischhackers of 54 acres (including the outlet dam and the water rights of Donner Lumber & Boom Company), apparently in the name of Floriston Land and Power Company (Tr. 189).

Thereafter, the United States Reclamation Service purchased another lakefront tract from Donner Lumber & Boom Company and began to construct an artificial outlet from Lake Tahoe, but was enjoined in view of the rights acquired by Floriston Land and Power Company. The Reclamation Service then initiated negotiations with

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3 Sierra's Reno hydroelectric development was dismantled before the commencement of this proceeding.

4 Those "interests" apparently were the Fleischhacker brothers who in or about 1903 owned two of the power developments between Truckee, California, and Reno, Nevada (Exhibit 35, at 9-10), which developments apparently were the only ones on that reach of the Truckee River at that time.

the Fleischhacker interests for the 54-acre tract and its appurtenant rights. And during the course of those negotiations the so-called Hammon interests acquired the power developments on the Truckee River (Exhibit 35, at 10-11), thereby separating the control of the power developments from the control of the outlet dam and paper mill.

In November 1908 the Floriston Land and Power Company and the Floriston Pulp and Paper Company sold the 54 acres to Sierra's predecessor, Truckee River General Electric Company (presumably, the Hammon Interests), which agreed to operate the Lake Tahoe outlet dam in such a manner as to maintain Floriston Rates. (Tr. 190.) Shortly thereafter, in February 1909, the United States Reclamation Service brought a lawsuit under the Reclamation Act of 1902 to condemn that property. (Exhibit 59, at 3). Nothwithstanding that litigation, it appears that Truckee River General Electric Company began to construct a concrete dam to replace the 1870 timber crib dam, that the construction was delayed, and that the concrete dam ultimately was completed in accordance with the design of the United States, including funding by the United States of costs in excess of those that would have been incurred by Truckee River General Electric Company. (Exhibits 31, at 234-236, and 59, at 17). It appears, therefore, that the concrete outlet dam, which is the present dam, was designed and constructed to accommodate both Sierra's predecessor power interests and the United States Reclamation Service's water supply interests.

The concrete outlet dam was completed or nearing completion when Sierra[5] and the United States entered into the 1915 consent decree in which Sierra retained an express right to have sufficient water stored in and released from Lake Tahoe to maintain the Floriston Rates for itself and its contractual obligation to the Floriston paper mill.

In the meanwhile, a 396 cfs flow was appropriated in 1902 for the Washoe development (constructed in 1904); a 327 cfs flow was appropriated in 1904 for the Fleish development (constructed in 1905); and a 399 cfs flow was appropriated in 1909 for the Verdi development (constructed in 1911). Furthermore, an additional 75 cfs flow was appropriated in 1906 for the Farad development, bringing its total appropriation to 400 cfs.[6] While all of those developments were, and still are, run-of-the-river in the sense that they have no adjacent pondage or storage, all of them obviously depended, and still depend to a large extent, upon the storage of water in Lake Tahoe, and the controlled release of that water, for their utilization as baseload hydroelectric generating facilities. In other words, they shared a common upstream reservoir and continue to share common upstream reservoirs and, therefore, they are controlled-river developments.

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5 During the course of the litigation Truckee River General Electric Company reincorporated under the same name; and the new corporation, which was the party to the decree, later changed its name to Sierra.

6 The Reno development had a total appropriation of 296 cfs, of which 250 cfs had a priority of 1891 and 46 cfs had a priority of 1909.

The foregoing historical background demonstrates vividly the importance that was attached to the storage and release of Lake Tahoe water when the power developments were constructed along the Truckee River. While the control of that water and the existing power developments was separated in 1902 or 1903, the power interests acquired control of the water in 1908 and did not relinquish that control until 1915 when the United States agreed, in effect, to provide substantially all of the water for power purposes that Sierra could have provided if Sierra continued to store and release the water. Indeed, the fact that the United States condemned an easement, rather than the fee, so that equitable title will revest in Sierra if the United States abandons the outlet dam, shows the continuing importance of the storage and release of Lake Tahoe water to the operation of the four power developments along the Truckee River.

The interlocking of the Lake Tahoe, Boca, Prosser Creek and Stampede reservoirs into a system for exchanging functionally equivalent water, described in Opinion No. 61, and the historic and continuing common sharing of those interlocked reservoirs for power generation from the respective times of their construction, are major factors in our conclusion that the four power developments along the Truckee River together with the various headwater reservoirs comprise a "project" within the purview of Section 3 (11) of the Federal Power Act.[7]

In view of Sierra's reliance upon the storage and continuous release of water for its baseload hydroelec-

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7 Furthermore, Sierra's Director of Land and Water Rights testified (Tr. 226) that the four power developments along the Truckee River are hydraulically coordinated.

tric developments and the interlocking of the principal reservoirs into a single system, we concluded in Opinion No. 61 that the water and power developments contributing to the generation of that power are constituent parts of a "project" within the purview of Section 3 (11) of the Federal Power Act. In view of that conclusion, and our further conclusion in Opinion No. 61 that the Verdi and Washoe hydroelectric developments are on a navigable reach of the Truckee River, the Farad and Fleish hydroelectric developments must be licensed as parts of that "project" whether or not they are on a navigable reach of that river.[8]

We turn next to the question of whether the Donner and Independence Lake developments on headwaters of the Truckee River must also be licensed as parts of the same "project". Sierra contends, in this connection, that it

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8 The goal of the Tribe and Interior is to obtain a Commission order or license condition which would result in a modification of the flows of the Truckee River to benefit the fisheries in the lower Truckee River and Pyramid Lake. In the light of that goal, our conclusion that the Washoe power development is jurisdictional because it is entirely within a navigable reach of the river, and the fact that it is the last power development downstream, we said on page 30 of Opinion No. 61 that nothing more was needed to enable us to act for the benefit of the downstream fisheries. In other words, if eventually we would be persuaded to act for the benefit of those fisheries, it didn't seem to matter whether our authority would be premised on the jurisdictional status of all four developments, or only the last one downstream.

The Tribe and Interior indicate in their opposition to Sierra's motion for a stay, *infra*, that they would like the four power developments operated in such a way as to avoid an intermittently dry river bed between the diversion points of the water and the points of its return to the river. In the light of that prospective issue in the licensing proceeding, we can understand why it could matter whether we have jurisdiction over one or all four developments.

has a right to utilize 17,500 acre-fee of water from Independence Lake for power generation, but no *express* right to utilize water from Donner Lake for the same purpose. Sierra also contends that "there is no evidence that water has *ever* been released from [Independence Lake] solely to supply water for power generation purposes" (Tr. 223-224), and, in any event, any possible use of water from the two reservoirs for power generation is incidental.

The Report of Joint Engineering Committee to the Joint California-Nevada Interstate Compact Commission on Natural Flow of the Truckee River, dated March 1957 (Exhibit 50, at 2), indicates that there is artificial storage in Independence and Donner Lakes. Furthermore, Sierra's Director of Land and Water Rights testified (Tr. 224) that

> [I]f the Floriston Rates aren't maintained, we need more water from Independence or Donner for power generation, they can be released for that purpose.
>
> However, most years, it is not needed as long as there is a normal flow in the river. We take the water from Independence and Donner and place it within the Floriston Rate, which is equivalent to storing.

We understand his testimony to be that in some years when the releases from Lake Tahoe and the other storage facilities are not sufficient to maintain Floriston Rates, water is released from Independence and Donner Lakes to bring the flows up to the Floriston Rates, which releases are equivalent to storing water in Lake Tahoe.[9]

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9 His testimony appears to confirm the statement in House Document No. 435, 87th Congress, 2d Session (of which official notice was taken in Opinion No. 61), at 13,

(Continued on next page)

The point is that the Independence and Donner Lake developments include dams and reservoirs "the use and occupancy of which are necessary or appropriate in the maintenance and operation of [the] unit" of improvement or development comprising the "project", if water is released from those developments to maintain specified flows (the Floriston Rates), and those flows are utilized to generate electric power. The fact that the use of the water for power generation may be incidental to some other use of the water is not germane. A similar argument was rejected in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, where we said at 37 (footnotes omitted),

> So long as any part of a project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole, and so long as interstate or foreign commerce is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.

As set forth in Section 10 (a), Part I of the Federal Power Act is concerned with multiple public uses of our nation's water resources. We have authority under Section 4 (e) to license project works respecting those uses as long as one of them entails the development, transmission and utilization of electric power.

(Continued from previous page)

Lake Tahoe and Boca Reservoir regulate stream flow for irrigation and power purposes, and further regulation is obtained from the Sierra Pacific Power Company's storage reservoirs at Donner Lake and Independence Lake.

THE SHOWING OF CAUSE

On October 10, 1979, Sierra sought to show cause pursuant to Ordering Paragraph (C) of Opinion No. 61 why a license for the Donner Lake Development is not required by Section 23 (b) of the Federal Power Act.[10] Sierra does not contend that the testimony of its Director of Land and Water Rights was incorrect. Instead, Sierra contends that Donner Lake is operated to serve the municipal, irrigation and industrial water customers of Sierra and the Irrigation District downstream from Sierra's four power developments on the Truckee River and, consequently, water is not released from Donner Lake specifically for power generation purposes. Accordingly, Sierra claims that the operation of Donner Lake is unrelated to "and has no significant effect on" the amount of electricity generated.

While Sierra does not deny that releases of water from Donner Lake contribute to the flows of the Truckee River that are utilized to generate electric power, it argues that Donner Lake is not "used or useful" in generating electric power, paraphrasing the portion of Section 3 (11) which applies to "miscellaneous structures used and useful in connection with" the complete unit of improvement or development or any part thereof. But the statutory test for dams and reservoirs which are not directly connected to the part of the unit of improvement or development which contains the generating facilities and power house, is whether they are "necessary or appropriate in the maintenance and operating of such unit".

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10 The Irrigation District did not file a showing of cause.

We do not question that the interlocked Lake Tahoe, Boca, Prosser Creek and Stampede reservoirs provide the principal volumes and flows of water which are used to generate power at Sierra's four power developments along the Truckee River. Nor do we question that, in comparison, Donner Lake can contribute only small volumes and flows to the Truckee River and, consequently, that the releases of water from Donner Lake have a comparably small impact upon the amount of electric power that is generated at Sierra's developments. But, to the extent that we are required to license the various developments that contribute to the generation of electric power along the Truckee River, we are required by Section 10 (a) of the Federal Power Act to condition the license or licenses in such a manner that in our judgment the project adopted will be best adapted to a comprehensive plan for improving or developing the Truckee River and other waterways for beneficial public uses. And, if we are to comply with that mandate, it is "appropriate" for the Commission to have regulatory control over the volumes and flows of the Truckee River that are utilized to generate that electric power and are not excluded from our jurisdiction for the reasons discussed in Opinion No. 61. It is therefore "appropriate" for the Commission to have regulatory control over the Donner Lake development as well as the Independence Lake development to carry out that responsibility.

We find and conclude that neither Sierra nor the Irrigation District has shown adequate cause why a license for their Donner Lake development is not required.

DENIAL OF A STAY

On September 10, 1979, Sierra filed a motion pursuant to § 1.13 of the Commission's Rules of Practice and Procedure for a stay of Opinion No. 61 pending final action on its application for rehearing and possible judicial review. On September 24, 1979, the Tribe and Interior, together, filed an answer opposing the motion.

Sierra contends that it would be injured irreparably in the absence of a stay because it would be required to incur "the potentially substantial expense of preparing and pursuing its license application". Sierra asserts, in this connection, that its corporate officers and employees would be required to set aside their primary responsibilities in order to devote their time and talent to this effort.

The Commission has broad discretion in exercising its judgment with respect to granting or denying stays of its orders. The principal criterion, in our judgment, should focus on the possibility and probability of irreparable injury. The United States Court of Appeals for the District of Columbia Circuit said, in this connection, in discussing the criteria for court-issued stays of Commission orders,[11] that the key word is *irreparable*:

> Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough.

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11 *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921 (C. A. D. C., 1958), at 925. While the criteria discussed therein for court-issued stays has served as a policy guide for Commission-issued stays, the Commission is not bound by those criteria in exercising its judgment.

We agree with the judgment of the Court of Appeals that injuries in terms of money, time and energy should not be treated as irreparable in the sense of justifying a stay. Since the injuries claimed by Sierra pertain to money, time and energy, in our judgment they are not irreparable and are not enough for a stay. We do not otherwise find good cause for staying Opinion No. 61 or this Opinion No. 61-A on rehearing and, therefore, we will exercise our discretion to deny a stay.

The Commission Finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed September 7, 1979, by Sierra Pacific Power Company present no facts or legal principles which would warrant any change in or modification of Opinion No. 61 and order issued August 10, 1979, except as that Opinion and order is clarified herein.

The Commission orders:

(A) The application for rehearing of Opinion No. 61 filed by Sierra Pacific Power Company on September 7, 1979, is denied.

(B) The petition for rehearing of Opinion No. 61 filed by the Pyramid Lake Paiute Tribe of Indians and the Secretary of the Interior on September 10, 1979, is hereby treated as a motion for clarification of Opinion No. 61 and is granted as such.

(C) The motion filed by Sierra Pacific Power Company on September 10, 1979, for a stay of Opinion No. 61, is moot insofar as it requests a stay pending this

action (Ordering Paragraph (A)) on its application for rehearing, and is denied insofar as it requests a stay pending possible judicial review.

(D) Ordering Paragraphs (B) and (C) of the Commission's Opinion No. 61 and order are hereby vacated. Within six months after issuance of this Opinion No. 61-A and order on rehearing, Sierra Pacific Power Company shall file an application pursuant to the Federal Power Act and the Commission's regulations thereunder for a license which shall include at a minimum its Farad, Fleish, Verdi and Washoe power developments in and along the Truckee River and its Independence Lake development on a headwater of the Truckee River, and Sierra Pacific Power Company and Truckee-Carson Irrigation District shall file such an application for a license for their Donner Lake storage development on headwater of the Truckee River.

(E) The Secretary shall cause prompt service of this Opinion and order upon Truckee-Carson Irrigation District.

By the Commission. Commissioner Hall voted present.

(SEAL)

KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 61

Docket No. E-9530

Pyramid Lake Paiute Tribe of Indians

vs.

Sierra Pacific Power Company

OPINION AND ORDER FINDING TRUCKEE RIVER TO BE NAVIGABLE AND REVERSING INITIAL DECISION

Issued: August 10, 1979

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. E-9530

Pyramid Lake Paiute Tribe of Indians

vs.

Sierra Pacific Power Company

OPINION NO. 61

APPEARANCES

Jeanne S. Whiteing, Charles E. O'Connel, Jr. and *Robert S. Pelcyger* for Pyramid Lake Paiute Tribe of Indians

James K. Mitchell and *Peyton G. Bowman, III* for Sierra Pacific Power Company

Harold Ranquist for the Department of the Interior

Harry W. Swainston for the State of Nevada

Linda Lee and *John D. Gossell, III* for the Staff of the Federal Energy Regulatory Commission

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JURISDICTION
NAVIGABLE WATERS
GOVERNMENT DAMS

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon, and
Matthew Holden, Jr.

Docket No. E-9530

Pyramid Lake Paiute Tribe of Indians

vs.

Sierra Pacific Power Company

OPINION NO. 61

OPINION AND ORDER FINDING TRUCKEE RIVER TO BE NAVIGABLE AND REVERSING INITIAL DECISION

(Issued August 10, 1979)

The Truckee River flows about 110 miles in a general northerly direction from Lake Tahoe on the common boundary of California and Nevada, into Pyramid Lake which is wholly within the Pyramid Lake Indian Reservation.[1] Sierra Pacific Power Company (Sierra) operates

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1 See Appendix A which shows the principal places and facilities discussed herein and was prepared from the maps within Exhibits 34 and 56 in conjunction with U. S. Geological Survey 7.5 series topographic maps of the Truckee River basin, of which official notice is hereby taken.

The Pyramid Lake Paiute Tribe of Indians (Tribe) is organized under the Indian Reorganization Act and is the governing body of the Pyramid Lake Indian Reservation which, in turn, was set aside in 1859 and confirmed by Executive Order in 1874.

and maintains four hydroelectric plants[2] along the approximate 14-mile reach of that river which begins after river mile 27[3], crosses from California into Nevada and ends before river mile 42 about 7 miles west of Reno. We find that the Truckee River is one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act[4] from Lake Tahoe to river mile

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2 The four plants are:

	Year Constructed	Name Plate Capacity (KW)	Water Appropriation* cfs	Date
Farad	1899	2,800	325	1899
			75	1906
Fleish	1905	2,000	327	1904
Verdi	1911	2,400	399	1909
Washoe	1904	1,500	396	1902
		8,700		

*Per the Orr Ditch Decree dated September 8, 1944.

The principal facilities of each of the plants consist of a concrete diversion dam, a 1.7 to 2.5-mile flume or ditch to a power drop, and a power house. There is no adjacent pondage or storage, and in each case the water is returned immediately from the power house to the river.

3 River mileage ordinarily is measured *upstream* from the mouth of a river. In the absence of such record evidence, we are estimating the mileage of the Truckee River downstream from Lake Tahoe in order to facilitate the discussion. The estimates are derived from the maps mentioned in Footnote 1 and are shown in Appendix A.

4 Section 3 (8) defines the term "navigable waters" as meaning

Those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between navigable parts of such streams or waters by falls, shallows, or rapids com-

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52, which is the site formerly occupied by the Eastman Mill about 2 miles east of Reno. And we conclude that Sierra is prohibited by Section 23(b) of that Act[5] from operating and maintaining its Farad, Fleish, Verdi and Washoe diversion dams in and across the Truckee River, together with the related water conduits and power houses along that river and all other works of its Truckee River Project[6] which are incidental to the development of elec-

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pelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

5 Section 23 (b) provides, in pertinent part,

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

As explained in Opinion No. 2 (*Puget Sound Power and Light Company*, Project No. 2494), issued October 28, 1977, the foregoing portion of Section 23 (b) was enacted in 1935 rather than 1920 as stated by the presiding judge.

6 Since a substantial part of the flow of the Truckee River is utilized by the developments mentioned in Footnote 2 sequentially as the water moves downstream, the developments are hydraulically coordinated and are, therefore, integral parts of a single unit of improvement or development within the definition of the term "project" in Section 3 (11) of the Federal Power Act, which should be licensed with their associated facilities as the "Truckee River Project".

tric power from the Truckee River waters diverted by the four dams, without a license issued pursuant to Section 4(e).[7]

THE TRUCKEE RIVER, PAST AND PRESENT

The Truckee River is an unusual waterway in that it has no outlet to the sea. It is the natural outlet from Lake Tahoe, a 193 square mile natural lake within the eastern slope of the Sierra Nevada Range. In 1870 the California legislature authorized the Donner Lumber & Boom Company, composed of the promoters of the Union Pacific Railroad, to construct a timber crib dam at the outlet of Lake Tahoe and clear the river channel from the dam to Truckee, California, 14 miles downstream, "so as to render it practicable to float saw logs, lumber and wood down said channel to said town of Truckee." The channel was cleared and the dam was constructed,[8] thereby

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7 Section 4 (e) authorizes the Commission, among other matters,

> To issue licenses . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for . . . the development, transmission and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam. . . .

8 By Colonel A. W. Von Schmidt in 1870 in connection with another venture which failed. Donner Lumber & Boom Company obtained control of the dam at a later time; and the Nevada State Journal reported in 1878 (Exhibit 18A), with respect to the river below the dam, that "a finer driving stream does not exist."

raising the natural surface elevation of Lake Tahoe by six feet and providing 750,000 acre-feet of water storage. The wood structure was replaced by a concrete dam in 1913, and the concrete dam has been operated since 1926 by the Truckee-Carson Irrigation District together with the Newlands Reclamation Project, the first such project under the Reclamation Act of 1902. Sierra has a right, however, to have sufficient water stored in and released from Lake Tahoe to maintain flows of 500 cubic feet per second (cfs) from March 1 through September 30 each year, and 400 cfs from October 1 through February 28 (or 29), which flows are known as the "Floriston Rates" and are currently measured at a gauging station near Sierra's Farad diversion dam.[9]

The gradient of the Truckee River is negligible for the first 3 miles from the Lake Tahoe outlet dam. There are rocky passages for the next 2 to 3 miles to Squaw Creek,[10] and the gradient descends 40 feet per mile, but for the next 9 miles to Truckee at river mile 14 there are fewer rocks and the gradient decreases to 30 feet per mile. Donner Creek flows into the Truckee River in that reach at about river mile 12.5. For the next 10 miles the gradient continues to descend at 30 feet per mile, there are rocky passages and the Truckee River is joined by Martis Creek at river mile 17, Prosser Creek at river mile 20 and the Little Truckee River at Boca at river mile 21.5. And for the next 6 miles to Floriston at river mile 27, the

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9 750,000 acre-feet of stored water in Lake Tahoe can produce a flow of more than 1,000 cfs for one year.

10 From 300 to 600 cfs, constant maneuvering of whitewater boats is required to avoid rocks. But that is also the area in which yearly slalom races are held.

gradient descends at 25 feet per mile for 5.5 miles until two long boulder-filled drops are reached in the last half mile, where the gradient is 100 feet per mile. Juniper Creek flows into the Truckee River in the beginning of that reach at about river mile 23.

For the next 9 miles to Verdi at river mile 36, passing Sierra's Farad and Fleish facilities together with its Verdi diversion dam and part of its Verdi conduit, the gradient descends at 35 feet per mile and the river is rocky, particularly in the reaches where the diversions reduce the flows.[11] Just beyond that reach, at about river mile 37, Dog Creek flows into the Truckee River.[12]

The Truckee River and its foregoing tributaries are characterized as flowing through canyons overlooked by bluffs which, according to some historic estimates, range up to one-half mile in height. While we find that one-half mile heights do not predominate along the Truckee River,

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11 Exhibit 34, from which the description is principally derived, ends at Verdi.

12 River miles 27 through 36 are generally Class II at 600 cfs (before diversions) for whitewater boating, but are classified according to the most difficult rapids (just below the Fleish diversion dam) as Class III or, at higher water, Class IV:

Class II: Easy. Bigger waves [than Class I], making a spray cover useful. Some rocks and other obstacles. Maneuvers are obvious and easy.

Class III: Medium. Rocky passages and moderate souseholes. Requires inspection from the boat before running. Large and irregular waves, requiring spray cover. Boater must be able to read water, catch eddies, and steer around obstacles.

Class IV. Difficult. Big drops; holes that can stop a boat; rocks that must be skillfully avoided; roll required; rescue difficult. Usually must be scouted from shore before running.

the U. S. Geological Survey maps mentioned in Footnote 1 indicate that there are points about one mile (horizontally) from the reach of the river in question which are about one-half mile above the elevation of the river.[13]

According to a 1957 report of the Joint Engineering Committee of the California and Nevada Compact Commissions[14] which attempted to reconstruct the natural flow of the Truckee River in 1859 when the Pyramid Lake Indian Reservation was set aside, the annual flows of that river at the California/Nevada state line based on 1922-23 through 1951-52 data, were as follows:

	Acre-Feet		
	Mean (30 Years)	Maximum 1951-52	Minimum 1930-31
Natural outflow from Lake Tahoe (without a dam)	140,100	423,660	8,690
Natural flow (other than from Lake Tahoe	363,300	806,680	139,000
Total flow at State Line	503,400	1,230,340	147,690

Those amounts are equivalent to an average continuous flow of 695 cfs for the 30 years, and continuous flows of 1,699 cfs for the maximum year and 204 cfs for the minimum year.

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13 For example, the elevation of the river in the vicinity of the Farad flume is about 5,200 feet m.s.l., and a point a mile to the east rises to 7,418 feet m.s.l. And the elevation of the river above the Fleish diversion dam is about 5,100 feet m.s.l., and a point a mile to the southeast rises to 7,843 feet m.s.l.

14 Exhibit 50.

PROCEDURAL BACKGROUND

On July 1, 1975, the Tribe filed a Complaint with the Commission asserting, among other matters, that the Tribe was then engaged in litigation[15] involving "thousands of defendants" to establish their rights and those of the United States to the waters of the Truckee River, and that it was essential to know in connection with that litigation (1) whether Sierra could lawfully operate its Farad, Fleish, Verdi and Washoe power plants without a license under the Federal Power Act and (2) whether future operation of those facilities will require continuation of the Floriston Rates.

The Tribe asserted, additionally, (1) that its members have lived on the shores of Pyramid Lake from time immemorial and have used its fish for food and trade, (2) that the Lahontan cutthroat trout and the cui-ui lakesucker are native to Pyramid Lake and are endangered species, (3) that those species spawn naturally in the Truckee River but cannot do so when the flows into Pyramid Lake are not adequate, (4) that the Floriston Rates flow regimen is not in the best interest of maintaining and preserving the fisheries in the Truckee River and Pyramid Lake, (5) that the Truckee River is a navigable waterway and (6) that Sierra is operating the four hydroelectric plants without a license and, consequently, in violation of the Federal Power Act. Accordingly, the Tribe asked for a declaratory order that Sierra's operation of its Farad, Fleish, Verdi and Washoe power plants is illegal, and for

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15 *United States v. Truckee-Carson Irrigation District,* Civil Action No. R-2987 JBA, U. S. District Court for the District of Nevada.

a further order requiring Sierra to stop operating those facilities in the absence of a license.[16]

On October 14, 1975, Sierra filed a combined Motion to Dismiss Complaint and Answer contending that it is not required to have a license under the Federal Power Act to operate and maintain the four power plants because the Truckee River is not navigable and, in any event, that the Commission should authorize the continued operation of those facilities pending the processing of an application for a license, if one is required.[17] Sierra argued that the Tribe is barred by laches, and, that there is no nexus between the Tribe's alleged injury to its fisheries and the Commission's licensing the facilities because the Tribe's goal is to obtain a water right with a priority of 1859 for those fisheries whether or not a license is issued.

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16 The Tribe asserted, in this connection, that if the four power plants are required to cease operations,

> rates of flow in the Truckee River can be established that would be more beneficial to the needs and requirements of the Pyramid Lake Paiute Tribe for the maintenance and preservation of the Pyramid Lake and Truckee River fisheries.

17 Sierra asserted, among other matters, that it is an integrated electric, gas and water utility; that as an electric utility it operates facilities in California and Nevada; that its transmission lines are interconnected to the east with those of Utah Power and Light Company, to the west with those of Pacific Gas and Electric Company and to the south with those of Southern California Edison Company; that its four plants along the Truckee River generated 78,210 Mwh in 1974 representing 4.6% of its total generation; that operation of those plants does not affect the downstream flow of the Truckee River; and that its right to divert the approximate 400 c. f. s. needed for those plants is sanctioned by two court decrees, including the Orr Ditch Decree in 1944 which also adjudicated the Tribe's right to use the waters of the Truckee River.

The Commission on November 19, 1975, granted petitions of the Secretary of the Interior (Interior) to intervene on behalf of the Tribe and of the State of Nevada (Nevada) to intervene on behalf of its citizens.

The Tribe filed a combined Response to Motion to Dismiss and Memorandum in Support of Petition for Declaratory Order on December 1, 1975, which Interior adopted on December 8, 1975. And the Commission, by order issued January 14, 1977, initiated a hearing pursuant to Sections 4(e), 4(g) and 23(b) of the Federal Power Act "on the issue of whether the Farad, Verdi, Fleish, and Washoe power plants . . . are within our licensing jurisdiction.

A prehearing conference was held in Washington, D. C., on February 23, 1977, after which a hearing was held in Reno, Nevada, on May 31, 1977. Following briefing, the presiding administrative law judge issued an Initial Decision on November 25, 1977, in which he discussed the background, evidence and law and concluded that Sierra's Farad, Fleish, Verdi and Washoe facilities are not subject to the Commission's licensing jurisdiction under any of the theories advocated by the parties, including the navigability of the Truckee River. We have before us the briefs on exceptions which were filed by the Commission staff and by the Tribe and Interior jointly, together with the brief opposing exceptions which was filed by Sierra. We also have before us a joint motion of the Tribe and Interior for leave to file a Supplemental Brief

on Exceptions, the supplemental brief and Sierra's Response in opposition.[18]

In view of our finding herein that the Truckee River is a navigable water of the United States at least as far downstream as river mile 52, beyond Sierra's hydroelectric plants, we do not reach and will not, therefore, address the other theories of jurisdiction other than to explain them briefly and to note that they are opposed by Sierra. The Commission staff contends, in this connection, that Section 4(g) of the Federal Power Act gives the Commission authority to require owners of unlicensed water power projects to file an application for license when a project comes within its licensing jurisdiction under Section 4(e), and the Commission is authorized thereunder to license project works across, along or in "any of the streams or other bodies of water over which Congress has jurisdiction" under its commerce powers. The Commission has jurisdiction over the Truckee River hydroelectric plants, the staff continues, because they generate electric power for transmission into interstate commerce, because they are on a headwater of the navigable Pyramid Lake and because Congress has asserted jurisdiction over the Truckee River by authorizing irrigation and flood control projects.

The Tribe and Interior contend, on the other hand, that the Truckee River hydroelectric plants cannot be

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18 The motion was filed 15 days after the related brief for the asserted purpose of bringing to the Commission's attention a matter which was "inadvertently omitted" from the brief, and the supplemental brief is only two pages. Sierra had an opportunity to, and did in fact, respond to the supplemental brief. Accordingly, the motion is granted.

operated and maintained without a Commission license because they utilize surplus water from three government dams, specifically, the Lake Tahoe outlet dam, the Boca Dam on the Little Truckee River and a dam on Prosser Creek.[19]

NAVIGABILITY

The Commission staff, the Tribe and Interior take exception to the presiding judge's conclusion that the affected reach of the Truckee River is not one of the "navigable waters" of the United States within the meaning of Section 3(8) of the Federal Power Act (Footnote 4).

The criteria for determining the navigability of waterways were established by the Supreme Court in *The Daniel Ball*, 77 U. S. 557, 563 (1871),

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Three years later in *The Montello*, 87 U. S. 430 (1874), the Supreme Court applied *The Daniel Ball* criteria to the Fox River in Wisconsin, and added, 87 U. S., at 441, that "the true test of the navigability of a stream does not depend upon the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." Rather,

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19 These and other dams will be discussed later in a different context.

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.

And the Supreme Court held, 87 U. S., at 443, that the Fox River, "which has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce, *in the only mode in which commerce could be conducted*" (emphasis added), was a navigable water of the United States, although due to changes in the economy the river was then used for commerce only as a result of certain channel improvements.

Although the "highways for commerce" concept was codified in Section 3(8) of the Federal Power Act, "the susceptible . . . in their ordinary condition" concept was modified to include "their natural or improved condition". The Section 3(8) criteria for determining the navigability of waterways for jurisdictional purposes under the Federal Power Act were considered and interpreted by the Supreme Court in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940), and succinctly summarized by the United States Court of Appeals for the Second Circuit in *Rochester Gas and Electric Corporation v. Federal Power Commission*, 344 F. 2d 594, at 596 (1965). By those criteria, a waterway is a navigable water if

(1) it *presently* is being used or is suitable for use, or

(2) it has been used or was suitable for use in the *past*, or

(3) it could be made suitable for use in the *future* by reasonable improvements,

in each case, for the transportation of persons or property in interstate or foreign commerce.

In recent years the flotation of logs has been given increasing, if not dominant, importance in determining the navigability of waterways for purposes of the Federal Power Act. In *Wisconsin Public Service Commission v. Federal Power Commission,* 147 F. 2d 743 (1945), the United States Court of Appeals for the Seventh Circuit affirmed a Commission decision that the upper reaches of the Wisconsin River were and are navigable waters of the United States because of their long, regular and commercially successful use in the transportation of logs and rafts. The same court, in *State of Wisconsin v. Federal Power Commission,* 214 F. 2d 334 (1954), affirmed another Commission decision that the East Fork of the Chippewa River was and is navigable because of logging operations. The United States Court of Appeals for the Second Circuit, in *The Connecticut Light and Power Co. v. Federal Power Commission,* 557 F. 2d 349 (1977), appears to have given great weight to the flotation of logs in affirming still another Commission decision that the Housatonic River was and is navigable. And the Commission, in Opinion No. 2 (*Puget Sound Power and Light Company,* Project No. 2494), issued October 28, 1977, gave great weight to the historic flotation of shingle bolts in deciding that the White River in Washington was and is navigable.

The bulk of the evidence in this proceeding is directed toward establishing that the Truckee River is navigable because it was used for many years for the flotation of logs in interstate commerce, or was suitable for such

use.[20] Accordingly, we will focus our inquiry upon the past use or suitability of the Truckee River for the transportation of persons or property, and particularly logs, in interstate or foreign commerce. If the Truckee River was so used or was suitable for such use at any time in the past, it remains navigable today.[21]

Past Use and Suitability

Conditions in the 1860's nurtured a lumbering industry in western Nevada and eastern California which mushroomed during that decade, flourished throughout most of the 1870's and pervaded the Truckee River basin well into the twentieth century. That basin was densely forested with red and white fir, as well as yellow and sugar pine, and tamarack (larch).[22] The Comstock Lode was

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20 Although the evidence is essentially documentary in character, hearsay evidence has probative value and is admissible in administrative proceedings under the Federal Power Act. See the discussion of Section 308 (b) in *Montana Power Co. v. Federal Power Commission*, 185 F. 2d 491, beginning at 497, (C. A. D. C., 1950).

21 "When once found to be navigable, a waterway remains so." *Appalachian, supra*, 311 U. S., at 408. "[A]bsence of use over long period of years, because of changed conditions . . . does not affect navigability of rivers. . . ." *Applachian, supra*, 311 U. S., at 409. And in evaluating the nature and quantum of the evidence bearing upon past use or suitability, "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence." *Appalachian, supra*, 311 U. S., at 416. Cf. *Economy Light & Power Company v. United States*, 256 U. S. 113 (1921), in which the Supreme Court held that the Desplaines River in Illinois was navigable even though it had not been used for commerce for almost one hundred years.

22 Mark Twain lived in Nevada for about three years from the latter part of 1861 and later described the shore of Lake Tahoe: "It was yellow-pine timberland—a dense forest of

(Continued on next page)

discovered in 1859 at the site which became Virginia City, and the Civil War placed great demands on its rich deposits of silver and gold. Nevada became a territory in 1861 and a State in 1864. The tracks of the Central Pacific Railroad pushed eastward along the Truckee River in 1867-68, through Reno, and toward their historic link with those of the Union Pacific Railroad, and the driving of the golden spike, at Promontory, Utah, in 1869. Finally, Virginia City and Carson City were linked in 1872 by the Virginia & Truckee Railroad to Reno and the Central Pacific Railroad.

Through the years Truckee basin forests provided the railroads with crossties, cordwood for fuel, timbers for bridges and trestles, and lumber for snowsheds and depots. Truckee basin forests provided timbers and lumber for the construction of numerous cities and towns in Nevada and areas which became its neighboring states, including the Mormon Temple in Salt Lake City which was begun in 1853 and took 40 years to construct. And Truckee basin forests provided timbers and cordwood fuel

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trees a hundred feet high and from one to five feet through at the butt." He also wrote of a sawmill on or near the shore of the lake, and of its "circling border of mountain domes, clothed with forests". "Roughing It", published in 1872. We take official notice of the quoted parts of Chapters XXII and XXIII which support the record evidence of the forestation of the area and the establishment of sawmills.

The Nevada State Journal reported in 1878 (Exhibit 18) that 230,400 acres of timberland were directly tributary to the Truckee Basin.

for the Comstock Lode mines[23] and quartz mills (smelters), as well as crates for southern California fruit and Alaska salmon.

While there were numerous small lumbering operators in the Truckee basin, nine large ones emerged.[24] Lumber milling slackened when the price of silver fell between 1877 and 1881, and after the latter date it proceeded at a slower and steadier tempo. In 1881 the Reno Gazette estimated that the Truckee basin had yielded 2 billion feet up to 1880 and that there were still another 2.5 billion feet remaining (including 50 to 75 million feet in Dog Valley).

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23 Mark Twain described the mines below Virginia City:

> [O]ver their heads towered a vast web of interlocking timbers that held the walls of the gutted Comstock apart. These timbers were as large as a man's body, and the framework stretched upward so far that no eye could pierce to its top through the closing gloom. . . . One . . . cannot well imagine what that forest of timbers cost, from the time they were felled in the pineries beyond Washoe Lake. . . . ["Roughing It", published in 1872.]

Washoe Lake is about midway from Virginia City to the northern shore of Lake Tahoe. We take official notice of the quoted part of Chapter LII which supports the record evidence of the use of Truckee basin timber in commerce, and particularly the Comstock mines.

24 Yerington & Bliss (Lake Tahoe area), George Schaffer (Martis Creek area), Richardson Brothers (upper Martis Creek area), Truckee Lumber Company (Truckee area), Elle Ellen (Trout and Alder Creeks area between Truckee and Prosser Creek), Boca Mill Company (Boca area), Pacific Wood & Lumber Company (river mile 23 area), Verdi Lumber Company (Verdi area) and Sierra Nevada Wood & Lumber Company (Prosser Creek area).

enough for another 50 years of cutting.[25] By 1909 seven of the nine large operators were no longer in the milling business. The eighth, Verdi Lumber Company, concluded cutting in 1926,[26] and the last, Sierra Nevada Wood & Lumber Company, ceased operations in 1936 after having cut about 1 billion feet in the preceding 40 years.

Log driving on the Truckee River began at the Lake Tahoe outlet dam, which was constructed in 1870 and used into the 1890's for flushing sawlogs into and down the river. The first U. S. Geological Survey of the Truckee basin was made in or about 1900 and published in 1902 as Water Supply Paper No. 68, which states at page 43 with respect to Lake Tahoe,

> In the channel of the Truckee River about 500 feet back from the lake, is a crib dam of timber and stone . . . which for the last twenty years or more has been controlled by the Truckee Lumber Company, which has used the lake waters for flushing logs down the river and for supplying power to its sawmills at Truckee when the natural flow of the stream is insufficient for those purposes. For the last five years the waters have not been employed for flushing logs, but they are still used for power purposes.[27]

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25 W. F. Edwards' Tourists' Guide and Directory of the Truckee Basin estimated in 1883 that there were 5 billion feet remaining.

26 The Orr Ditch Decree states that the Verdi Lumber Company was entitled to receive 2.5 c. f. s. of water with an 1894 priority through Sierra's Verdi ditch for supplying and maintaining its log pond in Verdi and for *logging* and saw mill purposes.

27 We take official notice of the quoted part of Water Supply Paper No. 68. While the outlet dam was under the control of Donner Lumber and Boom Company, it appears from the Nevada State Journal in 1878 (Exhibit 18A) that Truckee Lumber Company was owned by some of the owners of Donner Lumber and Boom Company.

The substance of the foregoing excerpt is consistent with the fact that Yerington & Bliss, which logged for 25 years principally in the Lake Tahoe area, shut down their mills in 1897.

E. B. Scott's "The Saga of Lake Tahoe" states at page 28 that Colonel Von Schmidt's

> . . . timber and rock fill obstruction in the river . . . was of help to the lumbermen. They could now "set 200,000 feet of logs behind the dam, open the gates when a head of water had been collected and be sure that the timber would carry down stream to the mills without continuously jamming."

Although it is not clear whether the "obstruction in the river" was the outlet dam which he constructed in 1870 or another dam which he constructed in 1875 four miles downstream near Bear Creek, splash dams between Lake Tahoe and Truckee were used as log "boosters" into the 1900's.

The high bluffs did not preclude the use of the Truckee River for floating sawlogs. The Truckee Lumber Company, which had a 75,000-foot daily capacity, built chutes composed of two logs lying side by side, abutting end to end and embedded slightly in the ground, and descending at grades of 24 to 45 degrees approaching the river. The inside faces were hewn smooth and greased with animal fat. Hooks were inserted into the rear ends of sawlogs having three or four logs in front of them, and teams of horses pulled the logs through the chutes in the flatter terrain toward the steeper chutes closer to the river:

> Sugar pine logs five feet in diameter, from 12 to 16 feet long, weighing at least ten tons, are drawn down

> the horse chute at a lively trot, the hook is loosened without stopping, and plunging over the top of the bluff, they go down the half-mile to the river like a streak of lightning. They follow each other like a drove of sheep, and a reservoir receives them, otherwise they would dash each other into kindling wood. The reservoir is three miles up the river from the mill. It might as well be ten miles, for the large heads of water which daily sweep down the channel from the dams of the Donner Boom and Lumber Company carry the logs down the river like shingle blocks.[28]

The Pacific Rural Press reported in 1883, with respect to the Truckee Lumber Company,

> On the river they start in at Tahoe and stop at Verdi. . . . A dam at the mouth of Lake Tahoe saves up the water and raises the lake several feet every winter. Gates are opened for a short time every day, and in the flood the logs are swept towards their end.[29]

The Pacific Wood & Lumber Company sawmill on the Truckee River one mile downstream from Boca (at river mile 23) was built in 1868 and produced about 45,000

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28 W. F. Edwards' Tourists' Guide and Directory of the Truckee Basin, dated 1883, pages 21 to 26.

29 Exhibit 10. In context, the statement that "they start in at Tahoe and stop at Verdi" appears to refer only to the geographic scope of the Truckee Lumber Company's lumbering and milling operations (as distinguished from the limits of its log driving on the river). The geographic scope is confirmed by the Northwestern Lumberman which reported in 1888 (Exhibit 37) that Truckee Lumber Company, Truckee, sawed 6 million feet of lumber in 1887, that Truckee Lumber Company, *Verdi*, sawed another 4 million feet, and that all the mills along the Truckee River sawed 44 million feet, which represented an increase of 9 million feet over 1886. And Exhibit 56 indicates that Truckee Lumber Company "invaded" Dog Valley in 1883, purchasing the timber holdings and sawmill of the Crystal Peak Lumber Company.

feet a day until it burned down in 1879. Part of the mill's lumber supply came from the Prosser Creek area, floating about 3.6 miles on the Truckee River from the mouth of Prosser Creek to the mill, and part came from the Little Truckee River area, floating about 1.4 miles on the Truckee River from the mouth of the Little Truckee River to the mill.[30]

Before focusing on log driving downstream from the Pacific Wood & Lumber Company sawmill at river mile 23, we will examine the presiding judge's evaluation of the evidence and his conclusion that "this record does not supply the requisite amount of evidence to find navigability on the basis of past logging activities." We will do so at this point because the judge's evaluation begins upstream, as ours does (although apparently only at Boca), and then proceeds to lower reaches of the river; because we have concluded from all of the evidence that the Truckee River was used regularly for driving and floating sawlogs to the mills along the river for an extensive period of time; and because we have also concluded that the upper 23 miles of the river from the Lake Tahoe outlet dam to the Pacific Wood & Lumber Company sawmill were the most intensely used section for floating sawlogs. Since the presiding judge's conclusion[31] is not limited to

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30 C. D. Knowles' "A History of Lumbering in the Truckee Basin", page 19. Reno Evening Gazette, September 26, 1877 (Exhibit 7).

31 The Initial Decision states, at page 10,

> In sum, the evidence adduced to demonstrate past logging drives on the Truckee discloses that the river never supported regular, or even infrequent,

(Continued on next page)

any particular reach of the river, but applies to the river in its entirety, it is appropriate to test his conclusion against the evidence applicable to the upper 23 miles.

The Initial Decision states, at page 8,

> The analysis begins with a newspaper account of a log drive in 1871 down the Little Truckee to the Boca Mill Company, which was located on the Truckee proper (Ex. 1, p. 22). There is no indication, however, that any log flotation in this drive actually took place on the Truckee itself.

The "newspaper account" is not a newspaper account at all, but is an excerpt from page 22 of C. D. Knowles' "A History of Lumbering in the Truckee Basin", which document is derived from the bibliographical research conducted under WPA Official Project No. 9512373. And the "log drive" was not a log drive according to the excerpt, which states,

> In 1871 the Little Truckee ran through a continuous belt of timber from its sources in Weber and Independence Lakes to its outlet at Boca, a distance of 30

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> modes of commercial log flotation. At most, log driving on the Truckee essentially was confined to a few isolated experiments (that were largely unsuccessful) on what was considered to be, by even its most avid publicists, an "entirely useless" stream for navigation. Even under the most liberal standard, this record does not supply the requisite amount of evidence to find navigability on the basis of past logging activities.

The statement is not consistent with the context of Exhibit 17 which says, in pertinent part,

> The waters of the Truckee are *not* to be entirely useless, we are glad to say. A drive of two million feet of logs and timbers has been placed in it at Verdi and is now being brought down. [Emphasis added.]

> miles. Log chutes precipitated logs into the river and the timber was floated downstream to the mill at Boca and to facilitate the work of river driving, dams were built at the outlets of both Weber and Independence Lakes so that it was only necessary to lift the gates in order to insure sufficient heads of water.

We agree with the judge's conclusion that the particular part of the particular exhibit does not indicate that any log flotation took place on the Truckee River, as distinguished from the Little Truckee River, at least without additional detailed information about the configurations of the Boca Mill Company's facilities and the confluence of the Little Truckee and Truckee Rivers. But we note that the immediately preceding part of the same exhibit states that from 1874 to 1882 the Pacific Shingle Company[32] produced 85,000 shingles daily at a site seven miles below Truckee on the Truckee River (at about river mile 21), and that shingle blocks were floated down Prosser Creek and down the Truckee River to that mill. The evaluation does not mention this evidence.[33]

> The Initial Decision continues, at page 8,
>
> In 1875, the Donner Boom & Lumber Company built a dam near the town of Truckee to "improve the channel of the Truckee River from Donner Lake vicinity" in order to float logs for the Truckee Lumber Company's mill at Truckee (Ex. 1, p. 23). The reference to log traffic on the Truckee River *in this exhibit* is clearly erroneous because the Truckee River proper does not flow between Donner Lake and

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32 Not to be confused with the Pacific Wood & Lumber Company at river mile 23.

33 Possibly, this was because the Pacific Shingle Company sawmill was upstream from Boca and therefore outside the geographic scope of the judge's consideration.

> Truckee. Clearly, the traffic indicated *in this account* must have taken place along the Little Truckee River. [Emphasis added.]

C. D. Knowles' "A History of Lumbering in the Truckee Basin" states, at page 23, as indicated by the judge, that the channel of the Truckee River was improved from Donner Lake *vicinity*. The incontestable geographic facts are that Donner Lake empties into Donner Creek, the latter flows about two miles to its confluence with the Truckee River, and the Truckee River then flows about a mile to Truckee. In the light of the geographic configuration, and particularly in the light of Exhibit 11 which is a copy of the 1870 legislation (1) authorizing Donner Lumber and Boom Company to improve the channel of the Truckee River "so as to render it practicable to float sawlogs, lumber and wood down said channel to said Town of Truckee" and (2) franchizing that company to collect tolls from those who float sawlogs and wood products down the channel, we can find no rational basis for attributing the particular log traffic on the Truckee River to the Little Truckee River.[34] If the log traffic in the account took place along the Little Truckee River, as indicated in the Initial Decision, the sawlogs would then

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34 The Initial Decision does not explain why Donner Lumber and Boom Company would improve the Little Truckee River for floating sawlogs in view of the fact that it was franchised to collect tolls for the use of the Truckee River, and Poca Mill and Ice Company held a similar franchise with respect to the Little Truckee River, according to Exhibit 18A. On the other hand, Donner Lumber and Boom Company would improve the channel of the Truckee River downstream from Donner Creek because, as indicated in Exhibit 18A, Truckee Lumber Company was owned by some of the owners of Donner Lumber and Boom Company. According to the same exhibit, both streams "are most excellently adapted for river driving."

have to have been transported about *seven miles upstream* from Boca if they were taken to the Truckee Lumber Company's mill at Truckee. Furthermore, according to the excerpt, the particular improvements made the Truckee River the best driving stream on the coast:

> During 1875 the Donner Boom & Lumber Company expended $8,000 to build a dam near Truckee and to improve the channel of the Truckee River from Donner Lake vicinity, making it "the best stream on the coast" at that time for driving logs.
>
> The Initial Decision continues, at page 8,
>
> Likewise, another account of some undated log drives in the vicinity of the Truckee Lumber Company is vague as to whether log flotation actually took place on the Truckee River itself, and therefore is entitled to little probative value.

The account in question is not identified and, therefore, we have no basis for testing its evaluation in the Initial Decision.

The evaluation of the evidence in the Initial Decision then proceeds downstream until it discusses an 1883 Pacific Rural Press newspaper account (Exhibit 10). As indicated in Footnote 29, we agree with the thrust of the judge's analysis that the key reference to Verdi deals with marketing rather than log driving. But we cannot agree entirely with the statement that "This article does no more than imply, in very general terms, the existence of log driving on the river and hardly can be deemed to be a basis for a finding of navigability on this segment." We acknowledge that the account does not establish that logs were driven in the vicinity of Verdi. But it confirms W. F. Edwards' Tourists' Guide and Directory of the Truckee Basin with respect to the Truckee

Lumber Company's dry chutes further upstream. And the account states specifically that the logs "plunge in" the river "and are at once fairly on the way to the teeth of the saws", and, "Gates are opened for a short time every day, and in the flood the logs are swept toward their end."

After discussing the aborted drive to the Stateline mill (Exhibit 19), *infra*, the evaluation concludes that log driving on the Truckee River was confined to a few isolated and largely unsuccessful "experiments", and that "this record does not supply the requisite amount of evidence to find navigability on the basis of past logging activities." Other than the 1883 Pacific Rural Press newspaper account (Exhibit 10), *supra*, the evaluation does not mention any of the exhibits cited thus far from which we have drawn the opposite conclusion, notably, E. B. Scott's "The Saga of Lake Tahoe" (Exhibits 3, 30 and 31)[35], which tells of the use of Colonel Von Schmidt's dam for logging; W. F. Edwards' Tourists' Guide and Directory of the Truckee Basin (Exhibit 55), which tells of the Truckee Lumber Company's dry chutes; and C. D. Knowles' "A History of Lumbering in the Truckee Basin"

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35 These exhibits contain photographs of log jams on the Truckee River near Rampart (river mile 2) in 1896 and 1899, and a photograph of the dam which Colonel Von Schmidt constructed in 1875, under which it is stated,

> Four miles downstream from the lake outlet stood von Schmidt's granite rock and logcribbed splash dam. . . . After loggers had floated enough sectioned pine to the dam, the gates were raised and a powerful rush of water swept the timbers down to the Truckee mills.
>
> Other small dams were built on the sixteen mile stretch of river between Tahoe's outlet and Truckee, all being used into the 1900's as log "boosters".

(Exhibit 1 at page 19) and the 1877 Reno Evening Gazette newspaper account (Exhibit 7), which tell of the use of the river to float logs to the Pacific Wood & Lumber Company sawmill.

The notion that log driving on the Truckee River was confined to a few "experiments" may have been derived from the 1878 Nevada State Journal newspaper account (Exhibit 18C), which discusses the squaring of timbers for the Comstock mines, and then states,

> The railroad prior to this year has afforded the only method of transportation. This Summer, however, Mr. Duncan McMillan, and parties interested with him drove a large quantity of timbers down the Truckee river to Reno. This is the first attempt to utilize the river as a driving stream for any considerable distance. The *experiment* established a fact heretofore well understood by lumbermen that few streams in America are better adapted for such a purpose. [Emphasis added.]

While the account does not state where the drive began, it appears that the "experiment" was in driving a "considerable distance", rather than driving at all.[36] And the account concludes that the "experiment" establishes that the Truckee River was *suitable* for drives of a "considerable distance" to Reno, which satisfies Section 3(8) as interpreted by *Appalachian*.[37]

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36 As discussed *infra*, log driving on the Truckee River was characterized by the shortness of the drives on the main stream.

37 Although the Initial Decision discusses the experimental timber drive to Reno which is reported in the middle column of Exhibit 18C, it does not mention the statement in the same column (which confirms Exhibit 1, at page 22) that shingle blocks were floated down Prosser Creek and the Truckee River to the Pacific Shingle Company mill at river mile 21.

In the light of the evidence of a major lumbering industry along the upper part of the Truckee River, and the clear, convincing and cogent evidence of the commercial use of that part of the river for floating sawlogs, we are unable to accept the finding in the Initial Decision (at page 10) that "navigability of the Truckee River has not been demonstrated on the basis of evidence of past logging activities."

Although the record indicates that there was substantial logging traffic of a commercial nature in the upper 23 miles of the Truckee River, it contains relatively little evidence of such traffic in the next 14 miles downstream to Dog Creek at river mile 37 (of which the final 9½ miles are currently utilized by three of Sierra's power developments). A mill known as the Stateline mill appears to have been constructed in or about 1900 near the present Southern Pacific Railroad bridge at river mile 31 below Sierra's Farad power house and above the present site of its Fleish diversion dam.[38] Although the Nevada State Journal reported in 1900 an aborted attempt to float the first drive of logs to that mill (Exhibit 19), it appears that the attempt was aborted because the logs jammed against the piers of a newly constructed bridge, rather than because of some natural condition of the river rendering it unsuitable for that purpose. And while the record does not indicate whether sawlogs were driven to that mill after the initial attempt, a photograph of the Truckee River and that mill taken in or about 1900 re-

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38 We were unable to locate the Stateline mill from the record. In fixing its location, we take official notice of Plate II-A and the map on page 9 of U. S. Geological Survey Water Supply Paper No. 68.

veals no apparent impediment to floating logs in that part of the river.[39]

The record indicates, additionally, that a sawmill was operated from 1875 until 1881 on the Truckee River "a mile above Verdi."[40] Although we have been unable to determine from the record whether sawlogs were floated to that mill, its general location and the geography of the area suggest that that was the case.[41]

Moving downstream, the record indicates that there was commercial logging traffic in the next 13 or 15 miles from Dog Creek at river mile 37 to Reno at river mile 50 or the Eastman Mill at river mile 52 (of which the first 4-½ miles are currently utilized by Sierra's power developments). The reminiscenses of George E. Peckham[42]

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39 Plate II-A, *supra*. We also take official notice of Plate VI-B which shows the Truckee River as being rocky but apparently capable of floating sawlogs looking downstream from the Floriston Pulp and Paper Company dam at or about river mile 27, as well as Plate III which shows the Truckee River as having too little water and being too rocky to float sawlogs during *low* water near Reno in July 1900.

40 C. D. Knowles' "A History of Lumbering in the Truckee Basin", at page 22. We interpret the phrase "a mile above Verdi" as meaning a mile upstream from Verdi.

41 Subject to interpretation, Exhibits 1 (at page 11) and 18C indicate that some flotation of sawlogs took place in the reach from river mile 23 through 37. Since the main thrust of those exhibits establishes sawlog traffic from Dog Creek at river mile 37 to Reno at river mile 50 or the Eastman Mill at river mile 52, their upstream interpretations are discussed *infra*.

42 Nevada Historical Papers, "Reminiscenses of An Active Life" (Exhibit 32).

are particularly illuminating since he states that in December 1865 his mother married T. W. Norcross, a widower with two boys, and, "We all moved down to the Eastman Mill where Mr. Norcross was employed."[43] Peckham, who later worked at the mill, stated that its logs, or some of them, came from the timber along the river westerly from Crystal Peak[44] and were prepared during the winter months for driving down the river to the mill ponds during high water in the spring.[45] We consider the evidence "particularly illuminating" since it shows the source of Peckham's knowledge of the use of the river and indicates that one in his position would have had such knowledge.[46]

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43 Exhibit 1 refers to "Thomas Norcross' mill at Glendale" as being one of the early sawmills in the Truckee basin, and Exhibit 6 refers to a "Mr. Norcross" being superintendent of the Eastman Mill in 1873. The Eastman Mill, located at about river mile 52, operated from 1865 to 1876.

44 The precise location of Crystal Peak as being just to the north or west of Verdi is not clear in the record, but the phrase "timber along the river westerly from Crystal Peak" clearly means Dog Valley via Dog Creek or, still more westerly, other streams via the Little Truckee River.

45 Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.

Economy Light & Power Company, supra, 256 U. S. at 122.

46 The fact that the melt of an inordinately heavy snowfall floated logs that had been cut for several years to the Eastman Mill, does not point "towards the conclusion that log drives on that segment of the river literally were freak occurrences," as stated by the judge. The complete statement (Exhibit 32, page 37) is,

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The Eastman Mill was said to have been

> . . . notable in that Eastman floated logs for some distance down the Truckee River. The San Francisco Bulletin of June 7, 1865 reported: "Richard Lent & Company recently cut 3,000,000 feet of pine logs, 6 miles below Lake Bigler [now Tahoe], which were put into the Truckee River and driven 25 miles to Eastman & Company's mill."[47]

While the presiding judge called that newspaper report geographically "nonsensical" in view of the 52 mile distance by river between Lake Tahoe and the Eastman Mill, we find that the account is reasonable if the logs were cut 6 land miles north of (below)[48] Lake Tahoe in the Juniper Creek watershed and then conveyed to the Truckee River at its closest point (probably via Juniper

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> The continuous high water in the Truckee during the season for driving the logs down the river enabled Eastman and White to make the biggest drive into their mill ponds they had ever made, and included a lot of government logs that had been cut for several years.

In the light of the references to the "season" for driving logs and the "biggest" drive, the statement clearly means that there were other drives in lower waters in a context of continuity from year to year. And the fact that the government logs had not been driven down the river, although they had been cut for several years, could have resulted from factors other than the suitability of the river for driving sawlogs in those years.

47 C. D. Knowles' "A History of Lumbering in the Truckee Basin", at page 11. A 25 mile drive on the Truckee River would have been "notable" in 1865 because the Truckee Lumber Company drove logs a maximum of only 14 miles from Lake Tahoe to Truckee, and the others drove logs on the river for even shorter distances.

48 "Below", considering the lay of the land between Lake Tahoe and Reno.

Creek below river mile 23), and then floated 29 miles down the Truckee River to the Eastman Mill.

The foregoing evidence supports Peckham's reminiscenses that sawlogs were driven down the Truckee River in the reach from river mile 37 to the Eastman Mill. Arguably, and depending upon its interpretation, it also indicates that in 1865, shortly before the Central Pacific Railroad pushed eastward along the Truckee River, sawlogs were driven down the river from the mouth of Juniper Creek below river mile 23, past Dog Creek at river mile 37, through the entire reach now utilized by Sierra's power developments, and to the Eastman Mill.

The Nevada State Journal reported on May 24, 1877, that two million feet were being brought down the Truckee River from Verdi, and that, "Last year one million feet of similar timber was shipped by the same route from Verdi for the Comstock."[49]

The foregoing account (Exhibit 17) is significant because it shows that, in addition to the Eastman Mill sawlogs, sizeable amounts of timber destined for the Comstock mines were floated down the Truckee River from the Verdi (river mile 37) area to the Reno area, and that such logging traffic continued after the Eastman Mill ceased operations in 1876. The presiding judge was plainly mistaken as to a material fact in stating that Exhibit 17 is not helpful "since the log drive did not even take place on the river segment of concern in this case."

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49 Exhibit 17. Lumber reported as placed in the river at Verdi would apparently come from Dog Valley which, as noted, had an available supply. Furthermore, Reno became a transshipment point to the Comstock mines when the Virginia & Truckee Railroad was completed in 1872.

The two reported drives took place in the segment now utilized by part of Sierra's Verdi ditch, as well as its Verdi powerhouse and its entire Washoe power plant. Exhibits 1 (at page 11), 32 and 17, among others, establish together that the Truckee River is navigable in fact, because it was used for the commercial transportation of property, in the 4-½ miles now utilized by Sierra's power developments downstream from Dog Creek.

The same newspaper reported eight months later on January 20, 1878 (Exhibit 18C), as already indicated, that,

> The railroad prior to this year has afforded the only method of transportation [of squared timbers for the Comstock mines]. This Summer, however, Mr. Duncan McMillian, and parties interested with him, drove a large quantity of timbers down the Truckee river to Reno. This is the first attempt to utilize the river as a driving stream for any considerable distance. The experiment established a fact, heretofore well understood by lumbermen, that few streams in America are better adapted for such a purpose.

Although the article does not state where the drive started, as noted by the judge, we do not agree with him that the third sentence of the foregoing quotation, referring to the "first attempt" to utilize the river as a driving stream "for any considerable distance," either characterizes log driving as being essentially experimental, or undermines the credibility of any evidence of log driving prior to 1878. We assume (as did the judge) that the newspaper was aware of the two 13-mile drives from Verdi downstream which it reported in May 1877

(Exhibit 17)[50] and, therefore, we understand the reference to a "considerable distance" to mean a point further away from Reno than Verdi. In such a context there would be nothing "strange" about the two newspaper articles, as indicated in the Initial Decision; the timbers would have been driven from a point or points further upstream than Verdi and possibly through the entire reach, rather than only part of the reach, now utilized by Sierra's power developments.

As in the case of Exhibit 1, at page 11, the foregoing evidence confirms Exhibit 17 that timbers were driven down the Truckee River from about river mile 37 to Reno. Arguably, and depending upon its interpretation, it also indicates that in 1877 timbers were driven down the river past Dog Creek at river mile 37, through all or a larger part of the reach now utilized by Sierra's power developments, and to Reno.

We find that a major lumbering industry operated in the Truckee basin for a half-century beginning in or about 1860, that it was centered in the approximate 10-mile reach of the Truckee River from Donner Creek (river mile 12.5) to the Pacific Wood & Lumber Company sawmill (river mile 23), and that the upper 23 miles of the river were used regularly for driving and floating sawlogs to the mills along the river for an extensive period of time. We find, additionally, that part of that industry drove and

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50 On the other hand, it seems apparent from the first sentence of the quotation that the Nevada State Journal in 1878 was not aware of the drive reported by the San Francisco Bulletin in 1865 before the Central Pacific Railroad was constructed along the Truckee River.

floated sawlogs on the Truckee River from Dog Creek (river mile 37) to Reno (river mile 50) and the Eastman Mill (river mile 52) through a segment of the river now utilized by Sierra's Verdi and Washoe power developments. Even if the use of that segment of the river for the periods involved did not establish that it is navigable by reason of having been used in fact for the transportation of property in interstate commerce (contrary to our finding), it establishes that the segment is navigable by reason of having been *suitable* for the transportation of property in interstate commerce.[51] We conclude that the Truckee River was and is a "navigable water" of the United States within the purview of Section 3(8) between the Lake Tahoe outlet dam (river mile 0) and the site of the former Pacific Wood & Lumber Company sawmill (river mile 23), and between the mouth of Dog Creek (river mile 37) and the site of the former Eastman Mill (river mile 52).

For jurisdictional purposes, nothing more is needed since Sierra's Washoe power development, which is the last one downstream, is situated entirely within and along the reach of the Truckee River downstream from the mouth of Dog Creek which is a navigable water, and is therefore required to be licensed. Similarly, Sierra's

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51 The Supreme Court said, in this connection, in *Economy Light & Power Company*, 256 U. S., at 122,

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.

The fact that sawlogs were floated and driven to the Eastman Mill for only eleven years goes to the extent of the river's use rather than to its capability of use.

Verdi power development, which is the next to last one downstream, is situated partly within that reach and is also required to be licensed. The 400 cfs of water utilized by the Washoe development would operate the Verdi development or one or both of Sierra's other Truckee River power developments. But those other developments are also required to be licensed because they are situated entirely within and along the reach of the river upstream from the mouth of Dog Creek, a reach which is a navigable water either in fact or in law.

In this connection, the Tribe and Interior contend, correctly,

> Assuming . . . that not a single piece of evidence existed in the record showing some type of actual navigation, or, susceptibility to navigation through improvements, on the 12-mile stretch of the Truckee where the power plants are located, the plants would still be jurisdictional and the Truckee would be a "navigable water" if the areas above and below the 12-mile stretch are found to be navigable.

We agree with their analysis of the law of navigability as applied to the facts of this case. Hydroelectric developments are constructed at sites where there are power drops, and such sites along waterways are generally characterized by falls, shallows and rapids. As pointed out by the Tribe and Interior in their brief, the definition of the term "navigable waters" in the bill which became the Federal Water Power Act was amended before enactment to its present form to include the parts of streams and other bodies of water which interrupt parts that are navigable in fact compelling land carriage, but which are not themselves navigable in fact. The amendment was ex-

plained in H. R. No. 910, 66th Cong., 2nd Sess. (April 30, 1920), at page 7:

> This amendment recasts the House definition as to the term "navigable waters," the House agreeing to the Senate definition with an amendment inserting after the word "interruptions" the words "between the navigable parts of such streams of waters," thus making it clear that *although the navigable parts of such streams may be interrupted by falls, shallows, or rapids, the portions occupied by falls, shallows, or rapids are within the jurisdiction of Congress and that no dams can be constructed at, upon, or across such falls, shallows, or rapids without securing a license as provided in the bill.* Under the House definition of "navigable waters" it might be possible to construct dams at the very point where dams would have to be located without securing such license. [Emphasis added.]

The statutory language does not mean that any part of a waterway which is situated between two other parts that are navigable in fact, however far apart, would itself be navigable in law. It speaks of "interruptions between the navigable parts . . . compelling land carriage". Having found that the Truckee River is navigable from Lake Tahoe to river mile 23[52], as well as downstream from river mile 37, and having found that there is a possibly significant obstruction to navigation consisting of the two long boulder-filled drops (50 feet in one-half mile) ending at about river mile 27 just upstream from Sierra's Farad

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52 The virtual nonexistence of record evidence of logging traffic between river mile 23 and the two drops which begin at river mile 26.5, does not mean that navigability ceases at river mile 23. The continued *suitability* of the river immediately downstream from river mile 23, in the absence of evidence to the contrary, is an important factor in our finding, *infra*, of navigability.

diversion dam, and considering also the proximity of those navigable parts to Sierra's power developments and the fact that those developments utilize substantially all of the approximate 10 miles between the end of the drops and Dog Creek where the river has been found to be navigable, we find that the part in question, if it is not itself navigable in fact, qualifies as an "interruption" between navigable parts.

Although we have not found any evidence that sawlogs or wood products were removed from the Truckee River, portaged around the part in question, and placed back into the river for further transportation, we find nonetheless that the part of the river in question qualifies as an interruption "compelling land carriage". The Truckee basin sawmills were located as close as practicable to the standing timber and were concentrated upstream from the part of the river in question. As a result, the further transportation downstream consisted of wood products rather than sawlogs. Since the Truckee River has no outlet to the sea, and particularly since it did not flow to the major markets for Truckee basin wood products, those products were transported to market principally by railroad. The wood products shipped to easterly markets naturally went by the Central Pacific Railroad (which was later acquired by the Southern Pacific Railroad) along the part of the river in question. Since the statute does not specify that land carriage must have actually occurred from one navigable part of the river to the other, but only that the interruption between navigable

parts should make land carriage a practicable necessity,[53] we find that the Truckee River is navigable in law to the extent that it might not be navigable in fact in the part in question.

It was proper for the presiding judge to focus on the question of whether the section of the Truckee River which is now utilized by Sierra's power developments was used in the past for driving or floating sawlogs or wood products. See Tr. 102-3. That is the critical part of the river. But he was mistaken as to a material fact in stating with respect to Exhibit 17 (Initial Decision, at page 9) that the approximate 4-½ miles downstream from Dog Creek was not part of "the river segment of concern in this case." And he erred insofar as he appears to have limited his focus to the evidence of navigability of the remaining part of the section of the river utilized by Sierra's power developments[54], instead of looking both upstream and downstream to ascertain whether the critical section of the river interrupted two navigable parts. For these reasons, in

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53 If the Truckee River flowed to the sea it is probable that wood products destined for some markets would have been placed into the river in the Reno area for further shipment because water transportation was historically less expensive than rail transportation, particularly for low value/high bulk products. There is evidence in the record, in this connection, that products of the Eastman Mill were rafted downstream to a minor extent.

54 "The question, then, is whether the Truckee was used for log flotation between Boca, California and Reno, Nevada." (Initial Decision, at page 8.) By thus beginning the analysis at Boca, the judge did not discuss the substantial body of evidence establishing the existence of a major lumbering industry or substantial logging traffic from the Lake Tahoe outlet dam, through the Boca area and to the Pacific Wood & Lumber Company sawmill.

addition to the evaluation of the evidence, we are compelled to reverse the Initial Decision.

Certain aspects of the evidence and the documents of which we have taken official notice lead us to the additional conclusion that the Truckee River was *suitable* for logging traffic, and is therefore navigable even if it did not in fact carry logging traffic, or if it carried only occasional logging traffic, in the section now utilized by Sierra's power developments upstream from Dog Creek. First, the river was clearly used for driving and floating sawlogs as far downstream as the Pacific Wood & Lumber Company sawmill, and nothing in the record suggests that its navigable character changed below that mill. Specifically, nothing indicates that the river flow was reduced in volume or changed in regime below that mill. Indeed, the gradient of 30 feet per mile from Squaw Creek (river mile 5 to 6) decreases after Boca (river mile 22) to 25 feet per mile, to the 50-foot drop in one-half mile (river mile 26.5). And going past Sierra's Farad and Fleish power developments, the gradient of 35 feet per mile is no greater than in the three miles to Squaw Creek where sawlogs were driven and whitewater craft are floated regularly. Except possibly for the 50-foot drop or a rock field immediately below Sierra's Fleish dam, the section of river in question appears to be as *suitable* for driving and floating sawlogs as the upper 23 miles of the river.

And second, we believe that factors other than suitability explain the small amount of logging traffic in the section of the river in question, if indeed the quantum of evidence applicable to that section is indicative of the quantum of traffic. Probably because the Truckee River

did not flow to the major markets for Truckee basin wood products, the log drives characteristically were not long ones to sawmills close to the markets or trans-shipment points. Instead, the log drives characteristically were short—often, only several miles—to sawmills which were located as close as practicable to the standing timber. The mills depended upon water for mechanical (and later electric) power, for their "V" flumes (discussed *infra*), and for their ponds for handling the characteristically large-diameter sawlogs. When the Central Pacific Railroad was constructed, depots were located at Truckee, the mouth of Prosser Creek, Boca, Verdi and other points for carrying the wood products to market. Accordingly, the sawmills in the Truckee basin, and particularly the major ones, concentrated in the vicinities of the confluences of the major tributaries of the Truckee River with the main stream, which is the 10 to 11 miles between the mouth of Donner Creek and the site of the former Pacific Wood & Lumber Company sawmill. That mill marked the downstream limit of the area of concentration, as evidenced by the fact that it "V"-flumed part of its sawlog supply a short distance *upstream* along the Truckee River from the Juniper Creek area.

Undoubtedly, the relative locations of the forests and other geographic factors contributed in a material way to the scarcity of logging traffic. To the east of the section of the river in question, the Nevada forests were denuded by 1880. To the west, the California forests had substantial timber for cutting. But the California forests were separated from the northward flowing Truckee River by a divide between it and the southward flowing Little Truckee River which drained a substantial part of the

California forests and was improved and used for floating sawlogs to Boca. Since the logging railroads and "V" flumes generally followed the streams, the vast majority of the sawlogs from the California forests in the Boca to Verdi reach of the river were taken by rail or water down the Little Truckee River to Boca. Those close to Dog Creek, which is a minor tributary, were taken to Verdi or downstream.

In summary, it appears that the absence of major tributaries for bringing sawlogs out of the California forests, or for locating major sawmills to which sawlogs might be driven short distances from upstream, disfavored logging traffic in the reach of the Truckee River now utilized by Sierra's power developments upstream from Dog Creek. In the absence of evidence to suggest that the navigable character of the river changed below the Pacific Wood & Lumber Company sawmill, and in the light of the evidence which indicates that the reach in question was used at least occasionally for driving or floating sawlogs, we conclude that that reach of the Truckee River is a navigable water of the United States within the purview of Section 3(8).

Past Improvability

The Reno Crescent indicated in 1872 that it was feasible to drive wood from Truckee to Reno, "and the cost would be but trifling."[55] The same newspaper said in 1873 that

> . . . with a very small outlay the river can be put in a condition for running logs even at the lowest stages

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55 Exhibit 5.

> of water. When we say a very small outlay, we mean small as compared with the sliding scale of freights charged by the railroad; an expense that would be more by the sale of the slab wood, for which there is always a ready market.[56]

While the foregoing indicia of improvability have little probative value as to economic feasibility, it appears that the "V" flume was invented in the Truckee basin in 1867, that "V" flumes were later used extensively throughout the basin, that they could operate on as little as 50 inches (1-¼ cfs) of water and that they ranged up to 5 and 5.5 miles in length. The Nevada State Journal commented in 1878 that "there is no practicable limit to the distance lumber can be flumed," and then reported,

> A large fine "V" flume has this year been constructed along side the Truckee River, above town, for a distance of two or three miles, the intention being to ultimately extend it to Lake Tahoe.[57]

While the commencement of construction indicates that some people believed that the transportation of sawlogs or lumber products down the Truckee River could be facilitated economically through such a device, there is no indication in the record of whether the "V" flume was completed.

Boating

The historic accounts of the "Nettie", "Pirate" and unnamed boats have probative value with respect to the navigability of the Truckee River from the Reno area

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56 Exhibit 6.

57 Exhibits 18 and 18C.

downstream.[58] But in view of our finding that the river is navigable from the mouth of Dog Creek to the Eastman Mill by reason of log drives, the historic accounts of boating are merely cumulative evidence of such downstream navigability, as is the evidence[59] of rafting products of the Eastman Mill down the Truckee River.

On the other hand, there is evidence[60] that the Truckee River is currently used for whitewater boating, a sport of comparatively recent origin, from Lake Tahoe to Verdi. There are yearly slalom races down to Squaw Creek. Apparently, the relative predictability of flow resulting from the Floriston Rates enhances the river's value for this purpose.

Legal Decisions

In *Shoemaker v. Hatch*, 13 Nev. 261 (1878), the Supreme Court of Nevada said that it was unnecessary to decide whether the Truckee River was navigable because, "It is conceded to be a highway for the floatage of wood and timber, and has been treated by the officers of the government as a navigable stream."[61]

Although *Shoemaker* and the other legal authorities in the record are not determinitive of the navigability of the Truckee River for jurisdictional purposes under the Federal Power Act, they are persuasive with respect to the navigability of the Truckee River generally in that the

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58 Exhibits 4, 9, 21, 22, 23 and 24.

59 Exhibit 32, page 32.

60 Exhibit 34.

61 Exhibit 39.

court and opposing counsel (in *Shoemaker*) were in apparent agreement that the logging activities then transpiring on the river came within the "highways for commerce" concept established by the Supreme Court in *The Daniel Ball* seven years earlier and reasserted in *The Montello* four years earlier. But those authorities have limited probative value with respect to the navigability of the parts of the river which are under consideration in this proceeding.

Certain Flood Control Improvements

As indicated in Footnote 4, "navigable waters" include

> . . . such . . . parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

Congress, as part of the Flood Control Act of 1938, authorized a comprehensive investigation of the Truckee River and its tributaries to develop a basin-wide plan for improvement for flood control, water supply, hydroelectric generation, conservation and recreation purposes. The investigation was suspended in 1961 pending the outcome of an interstate water compact. But two interim investigations under the comprehensive authority resulted in the authorization and construction of certain improvements.

As part of the Flood Control Act of 1954, Congress appropriated funds for improving the channel of the Truckee River for a distance of 3,200 feet downstream from the Lake Tahoe outlet dam to permit greater re-

leases at high stages, and for a distance of 7.5 miles in the Reno area to accommodate higher flows resulting from such greater releases. Although most of the improvements were made in 1959-60, minor channel improvements at several locations between Lake Tahoe and Reno were deferred indefinitely at the request of California. A record has not been developed with a view toward determining whether any of those deferred improvements pertain to parts of the river utilized by Sierra's Farad power plant or Fleish diversion dam and conduit in California.

And as part of the Flood Control Act of 1962, Congress appropriated funds for constructing a dam and impounding a 20,400 acre-foot reservoir on Martis Creek, which was completed in 1972. The recommendation of the Corps of Engineers[62] states that in fiscal 1958 the Corps removed accumulated bedload material from the channel of the Truckee River in Reno and removed and disposed of "dead trees, logs, and other drift from the channel between Reno and the Nevada-California state line, about 15 miles upstream . . . to help preserve that channel capacity."[63] It also states that the Corps spent about $100,000 for that work under authority of Section 208 of the Flood Control Act of 1954. We take official notice that Section 208 authorizes the Secretary of the Army to allot not more than $100,000 per tributary per year "for removing accumulated snags and other debris . . . in nav-

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62 We take official notice of the recommendation which is published as House Document No. 435, 87th Congress, 2d Session.

63 Sierra's Fleish, Verdi and Washoe developments lie within that 15-mile reach.

igable streams and tributaries" in the interest of flood control.[64]

Thus, the Corps of Engineers used flood control funds for *navigable* streams for clearing parts of the Truckee River which are utilized by Sierra's Fleish conduit and power house and Verdi and Washoe power plants. If that fact does not establish that those parts have "been authorized by Congress for improvement by the United States" and consequently, that they are "navigable waters" within the purview of Section 3(8), then it is at least supportive of the navigability in law of those parts.

The Washoe Project Improvements

In 1956 Congress enacted legislation, 43 U. S. C. §§ 614, *et seq.*, authorizing Interior to construct, operate and maintain the Washoe reclamation project for the purpose of improving the regulation of the runoff of the Truckee and Carson river systems to provide flood protection and drainage benefits, together with water supplies for irrigation, municipal, industrial, fish and wildlife, hydroelectric and recreational beneficial uses. Congress thereby authorized the improvements which are described and shown in Interior's 1954 Feasibility Report on the Washoe Project.[65]

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64 The recommendation states, additionally, that the successful operation of Martis Creek Dam and Lake depends upon local interests maintaining the channel between Reno and the Nevada/California state line clear of all floatable debris and other drift that is large enough to restrict bridge openings in Reno during floods.

65 See House Report No. 2055, 84th Congress, Second Session (1956), reprinted at 1956 U. S. Code Cong. and Adm. News, 3755. The Feasibility Report is published as House Document No. 181, 84th Congress, First Session (1955).

According to the Feasibility Report, the Washoe Project would include, among other facilities, a dam on the Little Truckee River about 10 miles from its confluence with the Truckee River, to be known as Stampede Dam, which would impound a 126,000 acre-foot Stampede Reservoir.[66] Water would be discharged from the bottom of that reservoir through the Stampede Tunnel, which would be 5.45 miles long, and run easterly through the divide between the southward flowing Little Truckee River and the northward flowing Truckee River. The water would then flow through a penstock and a power plant, to be known as the Calvada power plant, which would have a capacity of 20,000 kilowatts and be located on the Truckee River in or near the short reach of that river between Sierra's Fleish power plant and its Verdi diversion dam.[67] Finally, the water would be discharged into the Truckee River and would be regulated by a dam, to be known as the Calvada Dam, which would pond a 226 acre-foot Calvada Regulatory Reservoir in or near the reach of the river utilized by Sierra's Verdi conduit.

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66 As completed in 1970, Stampede Dam is about 8 miles from the confluence of the Little Truckee and Truckee Rivers and Stampede Reservoir has a capacity of 227,000 acre-feet.

Furthermore, Congress increased the dollar authorization in 1958 to permit the construction of Prosser Creek Dam and Reservoir as part of the Washoe Project. See House Report No. 2451, 85th Congress, Second Session (1958), reprinted at 1958 U. S. Code Cong. and Adm. News, 3717.

67 The estimated cost of the Calvada power plant includes a payment to Sierra for the prospective loss of power generation at its Truckee River power developments.

Although the foregoing improvements would not be expressly for navigation purposes, they obviously would have some navigation overtones. For example, Calvada Dam would obstruct the transportation of persons and property on the Truckee River. But Stampede Dam and Reservoir would help reduce the periods during which the flows of the Truckee River might be too high or too low for the transportation of persons and property, and thus aid navigation. In any event, navigation is only one of many purposes for which Congress might authorize improvement of a waterway which is subject to its commerce powers, and Section 3(8) does not expressly require the improvements to be for navigation purposes, to make a waterway navigable in law.

Section 3(8), stripped to its bare essentials, defines the term "navigable waters" as those parts of waterways over which Congress can exercise its commerce powers[68]

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68 The Supreme Court said, in this connection, in *Appalachian, supra*, 311 U. S., at 426,

> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. *Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control* . . . . [T]he authority of the Government over the stream . . . is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce . . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. [Emphasis added; footnote deleted.]

and which are used or suitable for the transportation of persons or property in commerce, "together with such *other* parts of streams as shall have been authorized by Congress for improvement by the United States. . . ." (Emphasis added.) Since we assume that Congress would not authorize improvements for navigation unless it is convinced that the part of the waterway in question is suitable for navigation, the above-quoted part of Section 3(8) would be surplus language, without meaning, if the improvements which would bring part of a waterway within the definition of "navigable waters" are limited to those which are for navigation purposes. In other words, the "other parts of streams" are those other than the parts which are used or suitable for transportation in commerce or which qualify as interrupting falls, shallows and rapids.

Section 3(8) therefore defines two situations in which parts of waterways that may not be navigable in fact are treated under the commerce powers as "navigable waters" for the purpose of enabling the Commission to exercise its licensing authority under Section 4(e). One situation involves the non-navigable interrupting falls, shallows and rapids. And the other involves parts of waterways which are *not* used or suitable for transportation in commerce, but which have been authorized by Congress under its commerce powers for improvement by the United States for any purpose.[69]

We conclude that the improvements which make a waterway navigable in law are not limited to those for

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69 Of course, the latter situation also includes parts that have been recommended to Congress for improvement after investigation under its authority.

navigation, but include any improvements within the commerce powers of Congress. We conclude, additionally, that the Truckee River is navigable in law in the reach utilized by Sierra's power developments upstream from Dog Creek and authorized for improvement by the United States as part of the Washoe Project.

CONTINUED OPERATION OF PROJECT

The sole question in this proceeding, as indicated, has been whether Sierra's Farad, Fleish, Verdi and Washoe power developments are required to be licensed under the Federal Power Act. Having concluded that Sierra must now prepare and file an application for a license for those developments,[70] it is appropriate to address (1) an error in its brief and the brief of the Tribe and Interior, and (2) the Tribe's request for an order which would require Sierra to stop operating those developments without a license, so that rates of flow can be established to benefit the fisheries in the lower part of the Truckee River and Pyramid Lake.

Sierra, and the Tribe and Interior, refer to Sierra's Farad, Fleish, Verdi and Washoe power developments as being "run-of-the-river", apparently because no reservoirs are connected directly to the respective facilities in or along the Truckee River. Presumably, therefore, Sierra would apply for a license to operate and maintain only the named developments in or along the river.

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70 On April 19, 1979, the Commission issued a Notice of Proposed Rulemaking in Docket No. RM79-36 proposing a simplified licensing procedure in the case of a "major project—existing dam", as defined therein. The proposed procedure may be available when Sierra files its application for a license.

Such a view would be too restrictive because Section 3(11) of the Federal Power Act defines the term "project" as meaning a complete unit of improvement or development consisting not only of power houses, dams and directly connected reservoirs, but also including dams and reservoirs "the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit". And the record in this proceeding indicates that several dams and reservoirs are operated by others, and one or possibly two by Sierra, in furtherance of the generation of electric power by Sierra's four power developments along the Truckee River.[71]

The first is the Lake Tahoe outlet dam which controls the 750,000 acre-feet of stored water in Lake Tahoe and was acquired by Sierra's predecessor in 1908 together with the 54-acre tract on which it was situated. In 1909 the United States initiated a condemnation proceeding under the Reclamation Act of 1902 to acquire the dam and tract for the Newlands Reclamation Project. The litigation was settled through a consent decree in 1915 under which the United States acquired a perpetual "easement and right of exclusive possession and enjoyment" of the new concrete dam and 14 acres immediately adjacent to the dam "for the purpose of controlling the level of Lake Tahoe and the storage of water therein". Sierra,

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71 If the dam(s) and reservoir(s) operated by Sierra are upon any part of the public lands or reservations of the United States, it is unlawful for Sierra to operate them without a license under the Federal Power Act. In this context, the record does not establish whether licensing of Sierra's four power developments is required by reason of any such dam or reservoir utilizing public lands or reservations of the United States.

on the other hand, retained full title to 40 acres, bare legal title to the remaining 14 acres[72] and a right to have sufficient water stored in and released from Lake Tahoe to maintain Floriston Rates to operate its power developments. In 1926 the United States transferred the operation of the Lake Tahoe outlet dam and the Newlands Reclamation Project to Truckee-Carson Irrigation District (Irrigation District), which is a "municipality" within the meaning of the Federal Power Act.

The second is Boca Dam which was completed in 1939 and controls 40,800 acre-feet of stored water in Boca Reservoir on the Little Truckee River about 2,000 feet upstream from its confluence with the Truckee River. Boca Dam was constructed by the United States pursuant to the 1935 Truckee River Agreement which provides for "Reduced Floriston Rates" and a complex system for exchanging Boca-stored water for Tahoe-stored water. It is operated by Washoe County Water Conservation District (Conservation District), which is also a "municipality", as part of the Truckee River Storage Project for power and other purposes, including Sierra's 800 acre-foot pondage interest.

The third is Prosser Creek Dam which was completed in 1962 and controls 30,000 acre-feet of stored water in Prosser Creek Reservoir approximately 1.5 miles upstream from the confluence of Prosser Creek with the Truckee River. Prosser Creek Dam was constructed by the United States and is operated by the Conservation

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72 The arrangement was designed to revest full title to the dam and the 14 acres in Sierra if the United States abandons the dam.

District as part of the Washoe Project and as the third unit of a complex system for exchanging Prosser Reservoir water for Boca Reservoir and Lake Tahoe water.

The fourth is Stampede Dam which was completed in 1970 and, as indicated, controls 227,000 acre-feet of stored water in Stampede Reservoir on the Little Truckee River about 8 miles upstream from its confluence with the Truckee River. Stampede Dam was constructed by the United States and is operated by the Conservation District as part of the Washoe Project and as the fourth unit of the same complex system for exchanging functionally equivalent water.

The fifth is Independence Lake on Independence Creek, a headwater of the Little Truckee River upstream from Stampede Dam and Reservoir, which is owned, and presumably operated, by Sierra. And the sixth is Donner Lake on Donner Creek, which is owned jointly by Sierra and the Irrigation District. Sierra's Director of Land and Water Rights testified that Sierra is authorized to use 17,500 acre-feet of water stored in Independence Lake and 9,500 acre-feet of water stored in Donner Lake for power generation, and that Sierra does so when Floriston Rates are not maintained.

We have spoken of a licensing application, in the singular, with respect to Sierra's Farad, Fleish, Verdi and Washoe power developments, because we have concluded, as indicated in Footnote 6, that they are integral parts of a single unit of improvement or development within the meaning of Section 3 (11), as are the respective dams and reservoirs mentioned above. We believe, therefore, that the four power developments should be covered by a

single license, which should also include Sierra's Independence Lake development.

For the same reason, we believe that the jointly owned Donner Lake development should be covered by the same license or, if Sierra and the Irrigation District choose, by a separate but operationally coordinated license. But since the Irrigation District is not a party to this proceeding and has not, therefore, had an opportunity to be heard, Sierra and the Irrigation District are being given the option of showing cause (other than with respect to the navigability of the Truckee River, which is decided herein) why the Donner Lake development is not required to be licensed under the Federal Power Act.

Although the Lake Tahoe outlet dam and impoundment and the Boca, Prosser Creek and Stampede dams and reservoirs are part of the same unit of improvement or development within the meaning of Section 3 (11) of the Federal Power Act, and although they are operated by "municipalities"[73] for power purposes, among others, we are satisfied that Congress has entrusted their operation and maintenance to Interior rather than to this agency under the Federal Power Act. The Lake Tahoe and Boca works are operated pursuant to Interior's authority under the Reclamation Act, which authorizes and directs Interior in Section 6 (43 U. S. C. § 491) to use the

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73 The first sentence of Section 23 (b), which is set out in Footnote 5, makes it unlawful for municipalities to operate dams and reservoirs for power purposes in navigable waters of the United States; and Section 4 (e), which is set out in pertinent part in Footnote 7, does not expressly restrict the Commission's licensing authority to non-Government project works.

reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under its provisions.[74] And the Prosser Creek and Stampede works are operated as part of the Washoe Project pursuant to Interior's authority under 43 U.S.C. § 614, which provides in pertinent part,

> For the purposes of . . . providing electric power . . . the Secretary of the Interior is authorized to construct, operate, and maintain the Washoe reclamation project consisting of two principal reservoirs at the Stampede and Watasheamu sites, together with other necessary works for the impounding, diversion, and the delivery of water. . . .

Under such circumstances we find that the Commission's licensing authority under Section 4 (e) should be construed in such a manner as to exclude dams and reservoirs which are expressly entrusted to Interior's authority under the foregoing statutory provisions. In this connection, the Commission's express authority therein to issue licenses for the purpose of utilizing water power

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74 Section 10 of the Reclamation Act (43 U. S. C. § 373) authorizes Interior to perform any and all acts and to make such rules and regulations as may be necessary and proper for carrying out its provisions; Section 1 of the Act (§ 391) establishes a reclamation fund for the construction and maintenance of irrigation works for the storage, diversion and development of reclamation waters; Section 2 of the Act (§ 411) authorizes the location and construction of such works; Section 4 of that Act (§ 419) authorizes the construction of such works by contract; and Section 6 (§§ 491 and 498) authorizes the use of the reclamation fund for the operation and maintenance of such works and, after certain payments are made, the management and operation of such works by the owners of the irrigated lands "to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior".

from Government dams,[75] would be surplusage, without meaning, if its general licensing authority, including the Commission's authority to license the construction, operation and maintenance of power houses and other project works, applies to both Government and non-Government dams. Accordingly, the Commission's general licensing authority should be construed as excluding Government dams, (that is, dams and non-power works) so that its express authority to issue licenses for the purpose of utilizing water power from Government dams expands the scope of its general licensing authority, and is not surplusage. In other words, the Commission has authority to license the construction, operation and maintenance of non-Government power houses and other project works specifically related only to the production and transmis-

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75 The term "Government dam" is defined in Section 3 (10) of the Federal Power Act as "a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others". In a 1919 bill the "surplus water or water power" clause of Section 4 (e) was applicable to "navigation" dams (rather than Government dams, as at present), which were defined as dams or other works constructed or owned by the United States for *the improvement of navigation*. As explained in the Conference Report accompanying S. 1419 (House Report No. 1197, 65th Congress, 3rd Session (1919)),

> The next amendment is the changing of the word "navigation" in the definition of "navigation dam" to that of "Government," and this change is carried all through the bill. It is thought that "Government dam" is a more comprehensive and clearer expression of what is intended than the expression "navigation dam." In the definition of the term "Government dam" the words "the improvement of navigation" are stricken out, and the words "Government purposes" are inserted. In the opinion of the conference committee this is a proper change as it is thought to be more comprehensive.

sion of power at Government dams (since those works would utilize the water power from those dams); but not the construction, operation and maintenance of those dams and other works not related only to the production and transmission of power.

The principal dams controlling the upper part of the Truckee River and its tributaries are owned by the United States and operated by the Irrigation District and the Conservation District; and those entities are required to operate those facilities in compliance with the terms of a 1915 court decree which is embodied within the 1935 Truckee River Agreement and the 1944 Orr Ditch Decree, all of which require the maintenance of Floriston Rates or Reduced Floriston Rates. Although those Government dams are part of the complete unit of improvement or development which also includes the Farad, Fleish, Verdi, Washoe, Independence Lake and Donner Lake developments, the continued operation and maintenance of which must be licensed under the Federal Power Act, we have concluded that those Government dams (and related works) are not subject to the Commission's licensing jurisdiction. Accordingly, it appears that we have only limited regulatory authority in the Tribe's principal area of concern, which is the control of flows in the Truckee River. Although an order requiring the Farad, Fleish Verdi and Washoe power developments to cease operations would obviously have some effect upon the downstream flows of the Truckee River, we are unable to conclude that such an order would itself bring about any substantial changes in the Truckee River flows. It appears, therefore, that the Tribe must look for relief principally toward the United States as the owner of the

Government dams and toward the Interior to whom their operation is entrusted.[76]

Since the licensing requirements of the Federal Power Act are subject to court interpretations which change from time to time, and since there are bona fide arguable situations, it is inappropriate in the absence of some other compelling reason to order a cessation of operations the moment it is decided that a particular hydroelectric development is required to be licensed. We find that the present situation was a bona fide arguable one and, therefore, that an order to cease operations is not appropriately based on the absence of a license in this instance. Furthermore, the justification for including the restoration of the Pyramid Lake fishery within the Washoe Project was based on the fact that the Washoe Project would provide supplemental water supplies for the Newlands Reclamation Project, and the conclusion of Interior and Congress that the present poor condition of the Pyramid Lake fishery is due in large measure to the latter project (which diverts water from the lower part of the Truckee River) and to irrigation works for the Pyramid Lake Indian Reservation.[77] Since we have only limited authority with respect to the flow of the Truckee River, and since the principal cause of the poor condition of Pyramid Lake

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76 43 U. S. C. § 614c, applicable to the Washoe Project, provides in pertinent part,

> Facilities shall be provided for the development of the fish and wildlife resources of the project area including facilities to permit increased minimum water releases from Lake Tahoe and restoration of the Pyramid Lake fishery.

77 House Report No. 2055, Footnote 65, *supra*.

does not appear to result from Sierra's operation of the four power developments, we are not persuaded to shut down those developments while an application for a license is being processed.

Accordingly, pending the filing and diligent pursuit in good faith of an application for a license as required by this Opinion and order, and the processing of that application, we will not order Sierra to cease operating and maintaining its Farad, Fleish, Verdi, Washoe and Independence Lake power developments on the ground that they are not licensed under the Federal Power Act.

Although this Opinion and order does not grant the interim relief requested by the Tribe, it should not be construed as saying that there is nothing we can or will do for the benefit of the fisheries in the lower part of the Truckee River and Pyramid Lake. Questions within our sphere of authority pertaining to the flows of the river and the possible cessation or alteration of the operation of the developments, and related matters, should be raised and considered in conjunction with the licensing of the Truckee River Project. The relevant facts may be ascertained at that time, and license conditions may be developed to grant appropriate relief or preserve flexibility of future action. The present record, however, was developed to decide jurisdictional issues and is therefore inadequate for deciding the appropriateness of relief for the fisheries.

The Commission further finds:

(1) Sierra Pacific Power Company (Sierra) is a corporation which is organized under the laws of the State

of Maine, and Truckee-Carson Irrigation District (Irrigation District) is an irrigation district which is organized under the laws of the State of Nevada.

(2) Sierra owns, operates and maintains part of a water power project (the Truckee River Project) in Nevada and Sierra Counties, California, and Washoe County, Nevada, with an installed capacity of 8,700 KW, which is connected to Sierra's interconnected transmission system and generates electricity for transmission in interstate commerce.

(3) Sierra operates and maintains four diversion dams (known as Farad, Fleish, Verdi and Washoe) in and across the Truckee River, a navigable water of the United States, between Floriston, California, and Mogul, Nevada, together with water conduits, power houses and other works of the Truckee River Project incidental to the development of electric power across, along or in the Truckee River, including a reservoir (Independence Lake) in aheadwater of the Truckee River, without having a permit granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23 (b) of the Federal Power Act.

(4) Sierra and the Irrigation District own a reservoir (Donner Lake) in a headwater of the Truckee River, a navigable water of the United States, and operate and maintain the said reservoir and other works of the Truckee River Project incidental to the development of electric power across, along or in the Truckee River, without having a permit granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23 (b) of the Federal Power Act.

(5) The Initial Decision holding that the relevant reach of the Truckee River is not a navigable water of the United States should be reversed.

(6) Sierra and the Irrigation District should be directed to file license applications for their facilities within the Truckee River Project.

The Commission orders:

(A) The Initial Decision issued November 25, 1977, holding that the relevant reach of the Truckee River is not a navigable water of the United States, and dismissing the Complaint, is reversed.

(B) Within six months after issuance of this Opinion and order, Sierra Pacific Power Company shall file an application pursuant to the Federal Power Act and the Commission's regulations thereunder for a license which shall include at a minimum its Farad, Fleish, Verdi and Washoe power developments in and along the Truckee River and its Independence Lake development on a headwater of the Truckee River.

(C) Within thirty days after issuance of this Opinion and order, Sierra Pacific Power Company and Truckee-Carson Irrigation District shall show cause (other than with respect to the navigability of the Truckee River) why a license for their Donner Lake development on a headwater of the Truckee River is not required by Section 23 (b) of the Federal Power Act. If they do not file a showing of cause within that time, then within six months after issuance of this Opinion and order, they shall file an application for such a license pursuant to

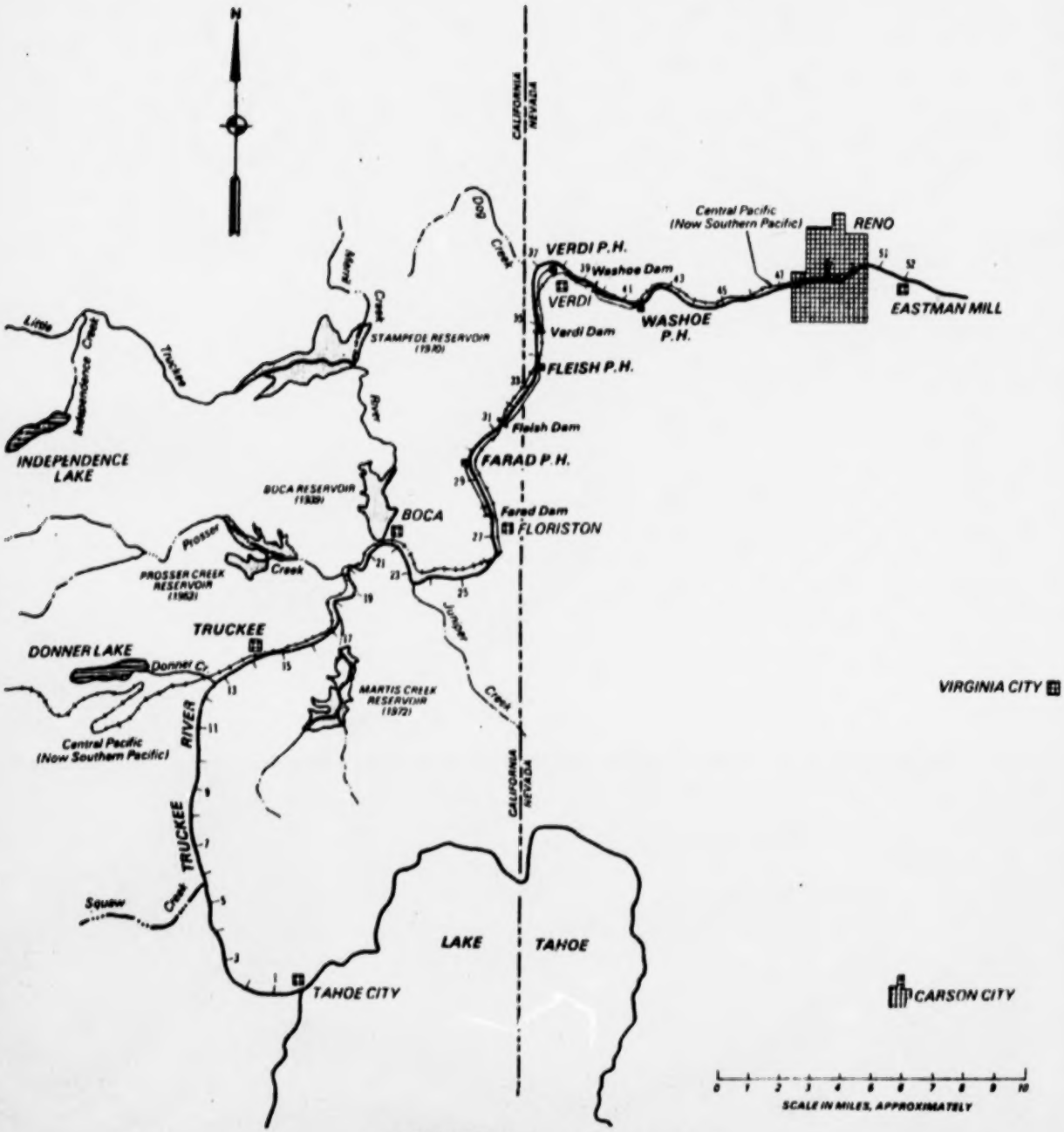
the Federal Power Act and the Commission's regulations thereunder.

(D) The Secretary shall cause prompt publication of this Opinion and order in the Federal Register and prompt service upon Truckee-Carson Irrigation District and Washoe County Water Conservation District.

(E) The exceptions with respect to all jurisdictional issues other than the navigability of the Truckee River are not reached and are, therefore, not decided.

By the Commission.

LOIS D. CASHELL,
Acting Secretary.



APPENDIX A
FEDERAL ENERGY REGULATORY COMMISSION
DOCKET NO. E-9630
(PYRAMID LAKE TRIBE V. SIERRA PACIFIC)
LOCATION MAP

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-7453

SIERRA PACIFIC POWER COMPANY,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ORDER

(Filed August 27, 1982)

Before: TRASK, SNEED and TANG, Circuit Judges

The petition for rehearing of the Pyramid Lake Paiute Tribe of Indians is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-7453

SIERRA PACIFIC POWER COMPANY,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ORDER

(Filed September 30, 1982)

Before: TRASK, SNEED and TANG, Circuit Judges

The petition for rehearing of the Federal Energy Regulatory Commission is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7625

ESCONDIDO MUTUAL WATER COMPANY,
CITY OF ESCONDIDO, and
VISTA IRRIGATION DISTRICT,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

SAN PASQUAL BAND OF MISSION INDIANS,
SECRETARY OF INTERIOR, etc., et al.,
Intervenors.

———o———

No. 80-7012

SAN PASQUAL, LA JOLLA, RINCON, PAUMA
and PALA BANDS OF MISSION INDIANS,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ESCONDIDO MUTUAL WATER COMPANY,
CITY OF ESCONDIDO and
VISTA IRRIGATION DISTRICT,
Intervenors.

———o———

No. 80-7110

THE SECRETARY OF THE INTERIOR,
acting in his capacity as trustee for the Rincon,
La Jolla and San Pasqual Bands of Mission Indians,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ESCONDIDO MUTUAL WATER COMPANY,
CITY OF ESCONDIDO and
VISTA IRRIGATION DISTRICT,

Intervenors.

OPINION

Petition for Review of Orders of
the Federal Energy Regulatory Commission
Argued and Submitted July 6, 1982

Decided November 2, 1982

Before: ANDERSON, FERGUSON and NELSON, Circuit Judges

FERGUSON, Circuit Judge:

• • •

ISSUES

Of the numerous issues presented to us in the three petitions for review, we need only consider the following:

1. Does the Commission have jurisdiction to license Project No. 176?

• • •

DISCUSSION

I. *The Commission's Jurisdiction.*

The Commission is authorized and empowered under the FPA to issue licenses

> for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams or the bodies of water over which Congress has jurisdiction under its authority to regulate commerce.

Section 4 (e) of the FPA, 16 U. S. C. § 797 (e) (1976). At the same time, the FPA makes it unlawful "for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto . . . except under . . . a license granted pursuant to this chapter." Section 23 (b) of the FPA, 16 U. S. C. § 817 (1976). The Bands and Interior contend that under these provisions the Commission's licensing authority extends only to projects the purpose of which is the development of electric power. They contend that Project No. 176 is not such a project. Alternatively, they contend that the Commission's jurisdiction extends only to power components of projects with a primary purpose of diverting water, and with a secondary or incidental purpose of developing electric power.

The starting point for analysis is the observation that the primary purpose of Project No. 176 is not the development of power. The ALJ found that the project's "predominant and clearly defined purpose" is irrigation, not power production. The Commission agreed, stating that "the principal function . . . is to convey water," Opinion 36 at 95, and that "[t]he generation of electric power is and always has been incidental to the primary purpose of the project," Opinion 36-A at 27. Indeed, the ALJ found that the horsepower generated by the project is "not even the equivalent to that produced by half a dozen modern automobiles," and concluded, in determining that the Commission was without jurisdiction to license the project, that "the production of power . . . can only be termed *de minimis* . . . especially in light of the miniscule

amount of power produced, both in absolute terms and relative to other projects."

Interior and the Bands do not contend that power generation must be the primary purpose of the project for the Commission to have jurisdiction. Such a contention would be wholly at odds with precedent. Rather, they contend that in this case the power generation aspect of the project is pure makeweight—that it is only included for the purpose of conferring jurisdiction on the Commission.

The Commission did not reach this question, relying instead on a very expansive reading of sections 4 (e) and 23 (b) of the FPA:

> So long as any part of a project is situated on navigable waters, or on public lands or reservations, and so long as that project generates any electric power, however minor in amount and however insignificant to the project as a whole, and so long as interstate or foreign commerce is affected, the works of that project are subject to be licensed and required to be licensed under the Federal Power Act.

Opinion No. 36, at 37-39 (footnotes omitted).

We are required to give great deference to interpretations by administrative agencies of the statutes they are required to administer. *Investment Co. Institute v. Camp*, 401 U. S. 617, 626-27 (1971); *Sierra Club v. Andrus*, 610 F. 2d 581, 602 (9th Cir. 1979), *reversed on other grounds*, 451 U. S. 287 (1981). This principle applies to an agency interpretation of the scope of its authorizing statute. *Peters v. Hobby*, 349 U. S. 331, 345 (1955); *Tennessee Valley Ham Co. v. Bergland*, 493 F. Supp. 1007, 1010 (W. D. Tenn. 1980). The question before us, therefore, is wheth-

er the interpretation of section 4 (e) put forth by the Commission is a reasonable one.

The FPA empowers the Commission to license projects "for the development, transmission and utilization of power," section 4 (e) of the FPA, and requires licenses to be obtained by persons who construct, operate, or maintain facilities "for the purpose of developing electric power," section 23 (b) of the FPA. No explicit language in the FPA limits the Commission's jurisdiction to projects where the primary, or a major, or significant, or non-*de minimis* purpose is to generate power. Thus, the broad interpretation advanced by the Commission is not inconsistent with the plain language of the statute, even though that language might equally well have been subject to a narrower interpretation.

Nor did the Commission, by applying its broad interpretation of the jurisdictional statute to the facts of this case, act so unreasonably as to require reversal. This case, unlike one that might someday arise, does not squarely present the question whether the Commission could properly apply its broad jurisdictional formula to a case where the power elements of the project were included as "mere sham and makeweight." There was no such finding in this case, and we decline to make one ourselves at this stage of the proceedings. It suffices merely to note that there must be some point beyond which the mere presence of a power generating element in a much larger project aimed at a different goal could not reasonably be thought to confer jurisdiction on the Commission over the whole project. Where such a line ought to be drawn, in the first instance, is a question for the Com-

mission rather than for this court. We are not persuaded at this point in the proceedings that the line has been crossed in this case, and we therefore decline to overturn the Commission's assertion of jurisdiction.

Interior and the Bands also assert that at any rate the Commission's jurisdiction is limited to the "power components" of the project. We find no error in the Commission's conclusion, supported by the findings of the A. L. J., that all of the licensed facilities are "physical structures" which "are used and useful in connection with" the power elements of the project, and therefore within the scope of the Commission's jurisdiction. *See* section 3 (11) of the FPA, 16 U. S. C. § 796 (11) (1976).

• • •

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No. 82-1103

In the Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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TABLE OF AUTHORITIES

Page

Cases:

FPC v. *Union Electric Co.*, 381 U.S. 90 4

Puget Sound Power & Light Co. v. *FERC*, 644 F.2d 785, cert. denied, 454 U.S. 1053 4

Rochester Gas & Electric Corp., 344 F.2d 594 ... 4

United States v. *Nevada*, 412 U.S. 534 3

Statute:

Federal Power Act, Section 3(8), 16 U.S.C. 796(8) 1, 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1103

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

Petitioner contends that the court of appeals erred in holding that the Truckee River is not a "navigable water of the United States," within the meaning of Section 3(8) of the Federal Power Act, 16 U.S.C. 796(8).

1. The Truckee River originates at Lake Tahoe, California, and flows into Nevada, where it empties into Pyramid Lake, which is located within the Pyramid Lake Indian Reservation. Respondent Sierra Pacific Power Company owns and operates four small hydroelectric plants on the river. In July 1975, the Pyramid Lake Paiute Tribe petitioned the Commission to exercise its regulatory jurisdiction with respect to Sierra's operation of its power plants and to require Sierra to terminate its operation of those facilities in the absence of a license. The Tribe claimed that the upstream diversion of water from the Truckee for the four Sierra plants was detrimental to its Pyramid Lake fisheries (Pet. App. 2-5 & n.1).

On the basis of evidence adduced at a hearing before an administrative law judge, the Commission found that the Truckee River is a navigable water of the United States within the meaning of Section 3(8) of the Federal Power Act[1] and that Sierra's power plants are subject to the Commission's licensing jurisdiction (Pet. App. 29-93). The Commission based its finding on evidence that the Truckee had in the past been used to float logs from forests near Lake Tahoe to saw mills situated along the river in California near the point at which the river crosses the state line from California into Nevada, and on additional evidence that the Truckee was also used to float logs from a point in Nevada somewhat downstream of the state line to Reno (*id.* at 44-64). The Commission noted that there was less evidence of actual use of the river at the state line itself, but reasoned that the state line reach was nonetheless navigable within the meaning of the statute, because that section of the river either was suitable for navigation or was an "interruption" between navigable sections of the river (*id.* at 67-71). The Commission observed further that Congress had approved a number of flood control improvements involving the Truckee and its tributaries, and that for this

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[1]Section 3(8) of the Act defines "navigable waters" to mean

> those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

additional reason the Truckee was a navigable water of the United States under the statute (*id.* at 74-80). Accordingly, the commission ordered Sierra to seek a license for its hydroelectric plants on the river (*id.* at 91).

2. The court of appeals reversed and remanded (Pet. App. 1-14; 681 F.2d 1134). The court held that there was no substantial evidence to support the Commission's findings that the Truckee is navigable or is suitable for navigation at the state line reach (Pet. App. 10). In addition the court expressed the view that the state line reach of the river does not constitute an "interruption" under the statute because "the river itself does not form a 'continuous highway' for commerce between the states" (*id.* at 12). Disagreeing with the Commission regarding the type of improvement to a waterway that will suffice to bring that waterway within the Commission's jurisdiction, the court held that such improvements must be for navigational purposes (*id.* at 13).

3. a. We agree with petitioner that the court of appeals incorrectly ruled that the Truckee River is not a navigable water under the Federal Power Act. The Truckee clearly is an interstate waterway and is connected to Lake Tahoe, which itself is a navigable interstate waterway. It is undisputed that the Truckee was once used to move goods in interstate commerce. Indeed, in *United States* v. *Nevada*, 412 U.S. 534, 535 (1973), this Court stated, albeit in a different context, that the Truckee River is "a navigable interstate stream." In requiring evidence of movement of commerce across the state line in order to bring the Truckee within the statutory definition of navigable waters, the court's decision appears to conflict with other decisions under the Federal Power Act finding navigability on the

basis of intrastate movement of goods. See, *e.g.*, *Puget Sound Power & Light Co.* v. *FERC*, 644 F.2d 785 (9th Cir.), cert. denied, 454 U.S. 1053 (1981); *Rochester Gas & Electric Corp.* v. *FPC*, 344 F.2d 594 (2d Cir. 1965).[2]

b. Although we believe that this case was incorrectly decided, we do not believe that it warrants review by this Court. The decision of the court of appeals rests on rather unique facts.[3] It is not likely to have any significant impact on the Commission's jurisdiction in other cases. Indeed, the holding below does not preclude the Commission from asserting jurisdiction over the dams in suit on a different basis.[4]

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[2]Moreover, this Court has noted that Congress delegated to the Commission the full scope of its authority to regulate use of the nation's water resources in those instances in which the Commission's hydroelectric licensing jurisdiction attaches. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 98 (1965). Consistent with this comprehensive authority, we submit that, once Congress has exercised its jurisdiction to improve a waterway—even for flood control purposes—the Commission may regulate hydroelectric developments on that waterway.

[3]The Commission is aware of no other case in which a finding of non-navigability under Section 3(8) of the Federal Power Act was based on the non-navigability of the waterway at the state line reach.

[4]In its opinion in this case, the Commission noted (Pet. App. 81 n.71) that the record did not establish whether the dams and reservoirs operated by Sierra were on public lands. If such were the case, it would afford another basis for the Commission's assertion of jurisdiction for the purpose of requiring a license under the Federal Power Act. Moreover, under the court of appeals' remand order, the Commission is free to consider alternative grounds for asserting jurisdiction over the projects in question.

In the circumstances, we are unable to represent that the case warrants review by this Court.

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Federal Energy Regulatory Commission

MARCH 1983

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No. 82-1103

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION
and SIERRA PACIFIC POWER COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF SIERRA PACIFIC POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Date: March 8, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit properly determine that the Truckee River is not a "navigable water of the United States" where the evidence showed that it was not used or suitable for use for interstate transportation of persons or goods by water; that the physical characteristics of the state line portion of the river formed a barrier which required that logs, having been transported for short distances by water within Nevada, be removed and transported thereafter by railroad to their ultimate destination; and that certain Federal improvements to the river were made for flood control purposes and did not render the river suitable for commercial transport?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	5
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Farmington River Power Co. v. *FPC*, 455 F.2d 86 (2nd Cir. 1972)	14
FPC v. *Union Electric Co.*, 381 U.S. 90 (1965)	14
FTC v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965)	10
Hardy Salt Co. v. *Southern Pacific Transportation Co.*, 501 F.2d 1156 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974)	13
Kaiser Aetna v. *U.S.*, 444 U.S. 164 (1979)	12
Minnehaha Creek Watershed District v. *Hoffman*, 597 F.2d 617 (8th Cir. 1979)	13
Montana Power Co. v. *FPC*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951)	11
National Wildlife Federation v. *Alexander*, 613 F.2d 1054 (D.C. Cir. 1979)	13
Puget Sound Power & Light Co. v. *FERC*, 644 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 1053 (1981)	12
Puget Sound Power & Light Co. v. *FPC*, 557 F.2d 1311 (9th Cir. 1977)	14
Rochester Gas & Electric Corp. v. *FPC*, 344 F.2d 594 (2nd Cir.), *cert. denied*, 382 U.S. 832 (1965)	11
U.S. v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940)	6, 8
U.S. v. *The Steamer Montello*, 78 U.S. (11 Wall.) 411 (1871)	6, 8
U.S. v. *The Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874)	12
U.S. v. *Truckee-Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981), *amended*, 666 F.2d 351 (1982), *cert. granted*, 103 S.Ct. 205 (1982)	4
The Steamer Daniel Ball v. *U.S.*, 77 U.S. (10 Wall) 557 (1871)	5, 6, 8, 12
Zuber v. *Allen*, 396 U.S. 168 (1969)	9

Table of Authorities Continued

Page

STATUTES:

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Section 3(8), 16 U.S.C. § 796(8) 3, 4

Section 23(b), 16 U.S.C. § 817 ..... *passim*

Section 313(b), 16 U.S.C. § 825*l*(b) 2, 5, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1103

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and SIERRA PACIFIC POWER COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF OF SIERRA PACIFIC POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Sierra Pacific Power Company,[1] petitioner in the case before the Court of Appeals for the Ninth Circuit and respondent before the Federal Energy Regulatory Commission (FERC) submits this brief in opposition to the petition for writ of certiorari.

---

[1] In accordance with Rule 28.1 of this Court, a complete listing of all parent companies, subsidiaries and affiliates of respondent Sierra Pacific Power Company follows: Sierra Pacific Power Company owns all of the common stock in Lands of Sierra, Inc., a real estate investment company, and Sierra Energy Company, an oil and gas exploration company.

OPINIONS BELOW

The Petitioner makes adequate reference to the reports of the opinion of the court of appeals, the initial order of the Federal Energy Regulatory Commission, and its order denying rehearing. The court opinion and the Commission's orders are contained as appendices in the Petition, and this Brief shall make references to those appendices where appropriate.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the Petition.

STATUTES INVOLVED

In addition to the provisions cited by Petitioner, Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), are involved in this case.

Section 23(b) of the Federal Power Act provides in pertinent part:

> (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, . . . except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

Section 313(b) of the Federal Power Act provides in pertinent part:

> The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

The full text of Sections 23(b) and 313(b) of the Federal Power Act are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner seeks review of a decision by the Ninth Circuit Court of Appeals that the Truckee River is not a "navigable water of the United States" within the meaning of Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, and therefore that Sierra Pacific Power Company (Sierra) was not required to obtain a license from the Federal Energy Regulatory Commission for the continued operation of four small, run-of-the-river hydroelectric generating plants which were constructed on the river between 1899 and 1911.[2]

The Truckee River is a turbulent mountain stream in a rocky, precipitous channel which flows northeasterly from Lake Tahoe, California for about 110 miles to its terminus at Pyramid Lake, Nevada. Sierra, an electric utility, operates these plants for the purpose of generating low-cost electric energy in the public interest (App. 30-36).

In July 1975, the Pyramid Lake Paiute Tribe of Indians (Tribe) filed a Complaint and Petition for Declaratory Order with the Federal Power Commission (now the Federal Energy Regulatory Commission) in which it alleged that Sierra's four hydroelectric plants were being operated in violation of Part I of the Federal Power Act, 16 U.S.C. § 791a, *et seq.*

Specifically, the Tribe alleged that the Truckee River is a "navigable water," as defined in Section 3(8) of the

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[2] Each plant individually diverts water from the Truckee River, up to necessary quantities, utilizes it immediately for power generation, and returns it to the river.

Federal Power Act, and therefore that Sierra was prohibited by Section 23(b) of the Federal Power Act from continued operation of its plants without the issuance of a license by the Commission pursuant to its authority under the Act. The Tribe alleged that licensing of these plants would permit modification of the rate of flow of water in the Truckee River in order to improve the quality of fishing in and around the Pyramid Lake Indian Reservation, which is located about 70 miles downstream from Sierra's plants.

Following an evidentiary hearing, the Administrative Law Judge, who had traversed the entire Truckee River, concluded that Sierra's hydroelectric plants were not subject to the Commission's licensing jurisdiction (*see*, App. 39). On appeal, the Commission found that the Truckee River is a "navigable water" as defined in Section 3(8) of the Federal Power Act, and accordingly reversed that conclusion (App. 31-32). In so doing, however, it recognized that Sierra's operation of the hydroelectric plants was not the cause of the deterioration in the Pyramid Lake fishery (App. 87-89).[3]

The Commission's finding of jurisdiction was reversed by the Ninth Circuit, which found that, while portions of the river were navigable, there was no substantial evi-

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[3] As shown in *U.S.* v. *Truckee Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981), *amended*, 666 F.2d 351 (1982), *cert. granted*, 103 S.Ct. 205 (1982), the Pyramid Lake's fishery was productive through the first part of the twentieth century, but declined thereafter as a result of diversion of water from the Truckee River at Derby Dam for the Newlands Reclamation Project, and a buildup of refuse from upstream saw mills. The Derby Dam is not involved in this case. Because Sierra's plants are located several miles upstream from Derby Dam and have no associated water storage capacity, their operation has no effect on the Pyramid Lake fishery.

dence to support the Commission's finding that the Truckee River is a navigable water of the United States.

SUMMARY OF ARGUMENT

This case raises no question more significant than whether the Ninth Circuit properly exercised its authority under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), to review the sufficiency of the evidence relied upon by the FERC for its decision that the Truckee River is a "navigable water of the United States."

The Ninth Circuit applied the correct standard of review to the FERC decision and gave appropriate deference to the FERC's determinations. On the merits, its decision is consistent with those of other courts of appeals that have considered similar questions. Moreover, it does not depart from the accepted and usual course of judicial proceedings, and does not decide any novel or important question of federal law.

When the FERC ruled that the Truckee River was a "navigable water of the United States," it did so despite the lack of evidence that the river had been used or was capable of being used for interstate transportation of goods or persons by water. It was therefore incumbent upon the Ninth Circuit to correct the Commission's error. That the Tribe, which had a full opportunity to create a full record on this subject, does not like the result hardly justifies grant of a writ of certiorari by this Court.

ARGUMENT

1. The Ninth Circuit's decision was based on a review of the sufficiency of the evidence.

Both the Commission and the Ninth Circuit relied in their determinations on the early decision of this Court in *The Steamer Daniel Ball* v. *U.S.*, 77 U.S. (10 Wall.) 557,

563 (1871) in which the Court defined "navigable waters of the United States" as waterways that form "a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water" (App. 2, 7-8, 41). The Ninth Circuit further cited *U.S.* v. *The Steamer Montello*, 78 U.S. (11 Wall.) 411 (1871), in which the Court ruled, conversely, that a navigable water is not a "navigable water of the United States" if it is only navigable between different places within the State (App. 8-9).

The Commission and the Ninth Circuit also relied on the criteria for "navigable waters of the United States" under the Federal Power Act enunciated in *U.S.* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), which incorporated the principles established in *The Daniel Ball* and *The Montello* (App. 8, 42).

The Ninth Circuit's reversal of the Commission was based solely on the lack of substantial evidence to support the Commission's finding that the Truckee River met the applicable criteria, as set forth in these decisions (App. 2, 7).

Specifically, the Ninth Circuit found no substantial evidence to establish that the Truckee River was used, or suitable for use, for transportation of goods in interstate commerce (App. 9-11). In so doing, it noted that portions of the Truckee River had been used for *intrastate* transportation of logs for short distances within California and Nevada, but found that the evidence relied upon by the Commission to establish interstate use of the Truckee River for this purpose was "tenuous at best and does not support a finding that the state-line reach of the Truckee was used for transporting timber." (App. 10) Similarly, the Ninth Circuit found that evidence of the suitability of

the Truckee River for transportation of persons or goods in interstate commerce, either in its natural state or as a result of reasonable improvements, was insubstantial (App. 10-11).

The Ninth Circuit also concluded that the evidence did not support the Commission's alternative characterization of the state-line portion of the Truckee River as a non-navigable "interruption" which compelled land carriage, because there was no evidence "that persons or property ever traveled downstream across the state-line reach of the Truckee with the aid of a portage or 'land carriage.' " (App. 11-12)

Finally, the Ninth Circuit rejected the Commission's contention that the Truckee River constituted a "navigable water of the United States" on the basis that the state-line portion had been "authorized by Congress for improvement by the United States" because the evidence failed to establish that such improvements rendered the Truckee River navigable, or were intended for that purpose (App. 12-14).

The Administrative Law Judge properly recognized that, at best, the "discussion on navigability centers on seemingly picayune individual fact determinations from inexact newspaper articles which reduce the decision-making process to a virtual absurdity." Indeed, as will be further discussed below, the Commission itself recognized the deficiencies in the record evidence, but attempted to overcome such deficiencies either by speculating or making assumptions about matters for which there was no record support, or excusing the need for proper evidence.

The Ninth Circuit simply refused to permit the Commission to avoid its responsibility to render its decision on the basis of the evidence. Such determination hardly

warrants review by this Court. Inasmuch as the Ninth Circuit's decision turned on the sufficiency of the evidence in this case rather than on a broad legal doctrine, the petition for writ of certiorari should be denied.

2. The Ninth Circuit gave proper consideration to the Commission's interpretation of the Federal Power Act and its view of the evidence.

As noted above, the Ninth Circuit's decision rested on its application of the criteria for "navigable waters of the United States" set forth in *The Daniel Ball*, *The Montello*, and *Appalachian Electric Power Co.*, to the facts of this proceeding. Inasmuch as the Commission similarly relied on these precedents, the interpretation of the Federal Power Act was not at issue.

Nor were the basic facts relied upon by the Ninth Circuit different from those found by the Commission. For example, the Commission found that

> Although the record indicates that there was substantial logging traffic of a commercial nature in the upper 23 miles of the Truckee River, it contains relatively little evidence of such traffic in the next 14 miles downstream to Dog Creek at river mile 37 (of which the final 9 1/2 miles are currently utilized by three of Sierra's power developments). (App. 57)[4]

In addition, as discussed by the Ninth Circuit, the evidence cited by the Commission showed that the navigable character of the intervening state line portion of the Truckee River was different from the upstream portion, in which most of the logging had occurred:

> . . . the Commission acknowledges that a "possibly significant obstruction to navigation" exists in the

[4] Particular river locations are shown on a map appended to FERC Opinion No. 61 (App. 93).

> half mile before river mile twenty-seven: two long boulder-filled drops are found in this stretch and the gradient is 100 feet per mile. ER-59; *See also* ER-32. The first of Sierra's facilities, Farad power plant, is located just below river mile twenty-seven, and the Commission's opinion confirms that the gradient of the Truckee throughout the next fourteen miles where Sierra's plants are situated is greater than the incline upstream from Sierra's developments. ER-31-32. (App. 10-11)

Such evidence rendered futile the Commission's effort to establish navigability of this portion of the river by assuming that it was no different from the upstream portion, in which navigation had been shown to exist.

Similarly, the Commission conceded that there was no evidence to show that the journey of sawlogs by water from above River Mile 23 was simply interrupted, rather than terminated, at that point:

> . . . we have not found any evidence that sawlogs or wood products were removed from the Truckee River, portaged around the part in question [from River Mile 23 to River Mile 37], and placed back into the river for further transportation. (App. 67)

Finally, the Commission cited no evidence to show that any of the federally-funded improvements proposed for the Truckee were for navigational purposes (App. 74-80).

In claiming that the Ninth Circuit failed to accord proper deference to the Commission's opinion, the Tribe would reduce the role of the reviewing court to a nullity. However, the phrase "navigable waters of the United States" is a statutory term, the construction of which is not peculiarly within the FERC's expertise.

This Court has emphasized that a court may not "abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber* v. *Allen*, 396 U.S. 168,

193 (1969). Rather, the agency's construction of its enabling legislation "is only one input in the interpretational equation of a reviewing court." *Id.* at 192. Thus, as the Court explained, in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965),

> while informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the [statutory words, here, "navigable waters of the United States"] set forth a legal standard and they must get their final meaning from judicial construction.

Similarly, the court of appeals has authority, pursuant to Section 313(b) of the Federal Power Act, to judge the sufficiency of the evidence believed to support the FERC's findings of facts, and to affirm, modify, or set aside the Commission's orders, as appropriate. In this instance, the Ninth Circuit properly exercised its authority to construe the Federal Power Act and review the sufficiency of the evidence on which the Commission's decision was based. Its refusal to adopt and affirm the Commission's decision simply reflected that, notwithstanding the grant of all due deference, the Commission's opinion could not withstand the scrutiny of judicial review.

3. The Ninth Circuit's decision is consistent with recent decisions of other circuits involving whether a particular body of water should be deemed to be a "navigable water of the United States."

As noted above, the Ninth Circuit found that while certain portions of the Truckee River were navigable, the evidence failed to establish that the Truckee River was used or suitable for use for transportation of persons or property in interstate, as opposed to intrastate, commerce.

The Tribe asserts that the Ninth Circuit's decision in this case is inconsistent with decisions of other circuits, and another decision of the Ninth Circuit, which have found certain waters to be "navigable waters of the United States" even though they were located entirely within a single state. However, in each case cited, the evidence established that the body of water in question was or could have been used at some time for transportation of goods or persons by water in interstate commerce. No such evidence is present in the case before the Court.

In *Rochester Gas & Electric Corp.* v. *FPC*, 344 F.2d 594 (2nd Cir.), *cert. denied*, 382 U.S. 832 (1965), the evidence showed that the Genesee River flowed into acknowledged avenues of interstate and foreign commerce by water (the Erie Canal and Lake Ontario), and that actual use of the river from some indeterminate point upstream (south) of Rochester, N.Y. to Rochester, six miles from the mouth of the river, for intrastate shipments demonstrated its suitability for use as a connecting waterway for interstate or foreign shipments. However, notwithstanding the fact that the source of the Genesee River was in Pennsylvania, the court reversed the Commission's determination that it was a "navigable water of the United States" at Mt. Morris, N.Y., sixty-five miles from its mouth, because of lack of evidence of actual use of that portion of the river for commercial purposes and because available evidence on the physical characteristics of the river showed that improvement of the river for commercial purposes was infeasible.

In *Montana Power Co.* v. *FPC*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951), the evidence showed that the Missouri River, also an interstate river, had been used for transportation of lumber and travelers above and below Great Falls, Montana, and that gold

miners traveled downstream from above the falls to below the falls with the aid of a portage around the falls. On the basis of this evidence, the court affirmed the Commission's conclusion that the portion of the Missouri River in question, which was entirely within Montana and almost entirely above Great Falls, was suitable for use for transportation of goods and persons in interstate commerce.

In all other cases on which the Tribe relies, including *Kaiser Aetna* v. *U.S.*, 444 U.S. 164 (1979); *The Daniel Ball, supra; The Montello*, 87 U.S. (20 Wall.) 430 (1874); and *Puget Sound Power & Light Co.* v. *FERC*, 644 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 1053 (1981), the evidence, although principally focused on an intrastate portion of the waterway, affirmatively established that the waterway was suitable for use for interstate transportation of goods and persons by water.

As discussed above, the evidence in this proceeding shows that while portions of the Truckee River were used for *intrastate* shipment of goods, the river was neither used nor suitable for use as a vehicle for transportation of goods in interstate commerce.

Portions of the Truckee River lying upstream from Truckee, California (River Mile 14) and Boca, California, (River Mile 21), were used, with the aid of "splash dams" for carrying saw logs short distances to saw mills located along the river. The portion of the river between Verdi, Nevada (River Mile 37), and Glendale, Nevada (River Mile 52) was similarly used for transportation of logs. However, the Ninth Circuit found that there was no substantial evidence that the state line portion of the river, between Boca, California and Verdi, Nevada, was used or suitable for use for interstate commerce, or that goods which were transported by water in California were portaged around the state line portion of the river in

order to continue their journey by water down the Truckee.

The cases relied upon by the Ninth Circuit, including *National Wildlife Federation* v. *Alexander*, 613 F.2d 1054 (D.C. Cir. 1979); *Minnehaha Creek Watershed District* v. *Hoffman*, 597 F.2d 617 (8th Cir. 1979), and *Hardy Salt Co.* v. *Southern Pacific Transportation Co.*, 501 F.2d 1156 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974), each involved situations such as that illustrated by the evidence in this case, in which the waterway in question was unsuitable for interstate transportation of goods by water.

Thus, the Ninth Circuit's determination that the Truckee River is not a "navigable water of the United States" is not in conflict with decisions of other circuits construing that phrase. Rather, it simply reflects that the facts in this proceeding were different from those in the cases cited by the Tribe in an effort to establish such a conflict.

4. Because the decision below is based entirely on the facts peculiar to the Truckee River and the specific circumstances of this proceeding, it is unlikely that the Ninth Circuit's decision will affect FERC jurisdiction over other hydroelectric power plants.

Prior to 1935, a license was not *required* for the operation of a hydroelectric plant located on nonnavigable waters unless some other jurisdictional criteria existed. However, the owner of such a plant could, in his discretion, seek such a license.

In 1935, the Federal Power Act was amended to require that persons constructing hydroelectric plants on nonnavigable waters after that time also obtain a license if the interests of interstate or foreign commerce would

be affected. Act of Aug. 26, 1935, 49 Stat. 846, *codified at* 16 U.S.C. § 817; *see also FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965); *Puget Sound Power & Light Co.* v. *FPC*, 557 F.2d 1311 (9th Cir. 1977); *Farmington River Power Co.* v. *FPC*, 455 F.2d 86 (2nd Cir. 1972).

Thus, the only hydroelectric plants which could be affected by the Ninth Circuit's decision are those, such as Sierra's, which were constructed on nonnavigable waters before 1935 for which the owner did not voluntarily seek a license.

Moreover, the Ninth Circuit's decision was based on the evidence of record in this proceeding, which showed that while portions of the Truckee River were "navigable," the river was not used or suitable for use for transportation of persons or property in *interstate* commerce.

Sierra is unaware of any other unlicensed hydroelectric power plants in which similar circumstances exist. Especially in light of the fact that hydroelectric power plants constructed after 1935 are subject to the Commission's licensing jurisdiction regardless of whether they are located on a navigable water of the United States, Sierra submits that the Ninth Circuit's decision will not have any significant effect on the Commission's licensing jurisdiction.[5]

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[5] Moreover, during the hearing, several alternative bases for Commission jurisdiction over Sierra's hydroelectric plants were also asserted. However, the Commission found it unnecessary to rule on these assertions because it believed it had jurisdiction over these plants from their location on what it took to be a navigable water of the United States (App. 40-41). Denial of the writ of certiorari will not prevent the Commission from considering these other possible bases of jurisdiction.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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APPENDIX

The full text of Section 23(b) of the Federal Power Act, 16 U.S.C. § 817, follows:

> (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, state, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

The full text of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), follows:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the addi-

tional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.